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APPENDIX

Relevant Docket Entries in the Supreme Court of Ohio

No. 72-389

May 22, 1972	Notice of Appeal, 1 copy
June 29, 1972	Order to certify Record sent Clerk of Courts
June 29, 1972	Cause docketed on its merits
July 11, 1972	Original paper filed
August 21, 1972	Appellant's Brief filed
September 14, 1972	Brief of Appellee filed
September 20, 1972	Brief of Appellee filed
May 23, 1973	Judgment affirmed
May 30, 1973	Original papers B.E. sent to Clerk
June 7, 1973	Mandate issued
June 7, 1973	Certified copy of Entry sent Clerk

Relevant Docket Entries in Court of Appeals of Ohio, Eighth District*

December 8, 1970	Notice of Appeal filed by Plaintiff-Appellant together with Precipe
December 11, 1970	Bill of Exceptions by Plaintiff filed and Notice issued
December 24, 1970	Bill of Exceptions received. Transmitted to Trial Judge
December 24, 1970	Bill of Exceptions received from Trial Judge
November 30, 1971	Judgment of the Common Pleas Court affirmed. Appellant excepts. Appellant to pay costs. Mandate to issue.

* The docket entries in the Court of Appeals were included on the docket sheet in the Court of Common Pleas.

Relevant Docket Entries in Court of Common Pleas

August 12, 1970	Complaint, motion for Temporary Injunction filed and Summons sent Certified Mail to Defendants
August 19, 1970	Return
August 31, 1970	Plaintiffs Affidavit filed
September 3, 1970	Plaintiffs Motion for T.R.O. merged with Complaint for Permanent Relief. Case advanced to 9-8-70. Answer to be filed by Defendant by 9-4-70
September 4, 1970	Answer of City of Shaker Heights and Paul K. Jones filed
September 4, 1970	Separate Answer of Metromedia, Inc. filed
September 17, 1970	Answer Brief of Shaker Heights & Jones Defendants filed
September 17, 1970	Brief of Defendant Metromedia, Inc. filed
December 1, 1970	Injunction denied, Petition is dismissed at Plaintiff's costs. Exceptions
December 8, 1970	Notice of Appeal filed by Plaintiff-Appellant, together with Precipe

Reference to Journal Entry of Court of Common Pleas

The Journal Entry of the Court of Common Pleas denying Plaintiff's request for a Temporary and Permanent Injunction against Defendants and dismissing the Petition is in the Appendix to the Petition for a Writ of Certiorari (which is attached to the Printed Petition) and is at Page 22a.*

* References in this appendix to the appendix attached to the petition for a writ of certiorari will hereafter be made as ____a. Cross-references to pages of this appendix and references to it in the brief will hereafter be made as _____A.

Reference to Journal Entry of Court of Appeals

The Journal Entry of the Court of Appeals of Ohio, Eighth District is printed in the Appendix to the Petition for a Writ of Certiorari at 19a-21a.

COMPLAINT

COURT OF COMMON PLEAS, CUYAHOGA COUNTY, OHIO

[Filed Aug. 12, 1970]

Case No. 885898

HARRY J. LEHMAN
Shaker Heights, Ohio

Plaintiff,

vs.

CITY OF SHAKER HEIGHTS, OHIO
Shaker Heights, Ohio

PAUL K. JONES
Director of Transportation
City of Shaker Heights, Ohio
Shaker Heights, Ohio

METROMEDIA, INC.
c/o C.T. Corporation
Statutory Agent
Cleveland, Ohio

Defendants.

1. Plaintiff is a resident, property owner and citizen of the City of Shaker Heights, a registered voter and candidate for the office of State Representative to the Ohio General Assembly for District 56, which includes the City of Shaker Heights.

2. Defendant City of Shaker Heights is a municipal corporation duly chartered and existing under the Constitution and laws of Ohio and is the owner and operator of the Shaker Heights Rapid Transit, and Paul K. Jones is the Director of Transportation of Defendant City of

Shaker Heights and the responsible officer for the Shaker Heights Rapid Transit.

3. Defendant Metromedia, Incorporated, by and through its Metro Transit Advertising Division, by written agreement with the Defendant City of Shaker Heights, is the exclusive agent and representative of the Defendant City of Shaker Heights, in the sale, placement and operation of all advertising space in and on the Shaker Heights Rapid Transit.

4. On or about July 3, 1970, Plaintiff sought to purchase advertising space on the Shaker Heights Rapid Transit for the months of August, September and October of 1970 from Defendant Metromedia, Inc., through its Metro Transit Advertising Division, for the purpose of advertising his political candidacy. Plaintiff was informed by the said Defendant that advertising space was available for the months of August, September and October of 1970, but that, under the terms of the agreement with Defendant City of Shaker Heights, Defendant Metromedia, Inc., could not accept, and refused to accept, any political advertising from Plaintiff for the Shaker Heights Rapid Transit.

5. On July 13, 1970, Plaintiff wrote to Paul Jones, Mayor, and Director of Transportation, of Defendant City of Shaker Heights requesting said Defendant to modify its policy of not accepting political advertising and to accept the advertising of Plaintiff, but that said Defendant refused to do so.

6. The absolute prohibition on political advertising in and on the municipally owned and operated transit system violates Plaintiff's rights of free speech under Sec. 11, Art. 1 of the Constitution of the State of Ohio and the First Amendment of the Constitution of the

United States, and his right of equal treatment and protection under the law under the Fourteenth Amendment of the Constitution of the United States.

7. Plaintiff has no adequate remedy by law, and unless restrained, the Defendants will continue to refuse to accept Plaintiff's political advertising.

WHEREFORE, Plaintiff prays for a declaratory judgment as to whether the constitutional rights of the Plaintiff under Sec. 11, Art. 1 of the Constitution of the State of Ohio, and the First and Fourteenth Amendments of the Constitution of the United States, have been violated and infringed upon by the refusal of the Defendants to accept the political advertising of Plaintiff on the Shaker Heights Rapid Transit; for a temporary and permanent injunction restraining the Defendants, their respective officials, agents and employees, from refusing to accept the political advertising of Plaintiff on the Shaker Heights Rapid Transit, and for such additional relief, legal and equitable as may be appropriate and just, for reasonable legal fees, and for its costs herein.

FALSGRAF, REIDY, SHOUP & AULT
By s/ HARRY J. LEHMAN
Harry J. Lehman
And /s DONALD L. GRONINGER
Donald L. Groninger
1050 Union Commerce Building
Cleveland, Ohio 44115
771-2345
Attorneys for Plaintiff

SEPARATE ANSWER OF DEFENDANT METROMEDIA, INC.

COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Case No. 885898

HARRY J. LEHMAN

Plaintiff,

v.

CITY OF SHAKER HEIGHTS, OHIO, ET AL.

Defendants.

Now comes defendant, Metromedia, Inc., and for its separate answer to the complaint of the plaintiff, states:

1. For lack of knowledge this defendant denies the allegations of paragraph 1.

2. This defendant admits the allegations of paragraph 2.

3. This defendant admits the allegations of paragraph 3.

4. This defendant admits the allegations of paragraph 4.

5. For lack of knowledge this defendant denies the allegations of paragraph 5.

6. This defendant denies the allegations of paragraph 6.

7. This defendant admits that it will continue to refuse to accept plaintiff's political advertising pursuant to paragraph 15 of the Agreement dated August 1, 1970, by and between defendant, City of Shaker Heights, and this defendant.

WHEREFORE, having fully answered, defendant, Metromedia, Inc., prays that plaintiff's complaint be

dismissed and that this defendant may go hence with its costs without day.

H. STEPHEN MADSEN
1956 Union Commerce Building
Cleveland, Ohio 44115
621-0200
Attorney for Defendant
Metromedia, Inc.

Of Counsel:
BAKER, HOSTETLER & PATTERSON
1956 Union Commerce Building
Cleveland, Ohio 44115
621-0200

CERTIFICATE OF SERVICE

A copy of the foregoing separate answer of defendant, Metromedia, Inc., was served upon Harry J. Lehman, plaintiff, 1050 Union Commerce Building, Cleveland, Ohio 44115 and Walter C. Kelley, attorney for defendants City of Shaker Heights, Ohio, and Paul K. Jones, National City Bank Building, Cleveland, Ohio, by United States mail, postage prepaid, this _____ day of September, 1970.

Attorney for Defendant
Metromedia, Inc.

ANSWER OF DEFENDANTS CITY OF SHAKER HEIGHTS, OHIO AND PAUL K. JONES

COUNTY OF CUYAHOGA
IN THE COURT OF COMMON PLEAS

Case No. 885898

HARRY J. LEHMAN,

Plaintiff,

vs.

CITY OF SHAKER HEIGHTS, et al.,

Defendants.

First Defense

1. These defendants admit the allegations contained in paragraphs 1, 2, 3, and 5 of the complaint.

2. Defendants admit that under the terms of the agreement with defendant City of Shaker Heights, it is agreed that defendant Metromedia, Inc. shall not place any political advertising on the city's rapid transit cars, but alleges that it is without knowledge or information sufficient to form a belief as to each and every other allegation of paragraph 4 of the complaint.

3. Defendants deny that the policy of defendant City of Shaker Heights prohibiting political advertising on a municipally owned transit system violates plaintiff's rights of free speech under Section 11, Article 1 of the Constitution of the State of Ohio or the first amendment of the Constitution of the United States, or his right of equal treatment and protection under the law under the fourteenth amendment of the Constitution of the United States.

4. Defendants deny each and every allegation in

plaintiff's complaint except those admitted to be true herein.

Second Defense

1. The complaint fails to state a claim against defendants upon which relief can be granted.

WHEREFORE, defendants City of Shaker Heights, and Paul K. Jones, having fully answered, request judgment that the complaint be dismissed with costs, charged to plaintiff.

WALTER C. KELLEY, JR. of
KELLEY AND MCCANN
1519 National City Bank Building
Cleveland, Ohio 44114—241-3141
Attorney for defendants
City of Shaker Heights, Ohio and
Paul K. Jones

SERVICE

Defendants served the foregoing Answer on Harry J. Lehman, Attorney for the Plaintiff, at 1050 Union Commerce Building, Cleveland, Ohio, and Baker, Hostetler and Patterson, Union Commerce Building, attorneys for defendant Metromedia, Inc. by mailing a copy to each of them on the 4th day of September, 1970.

WALTER C. KELLEY, JR.

PORTION OF TRANSCRIPT OF PROCEEDINGS

* * * [18]

THEREUPON the Plaintiff, HARRY J. LEHMAN, to maintain the issues on his part to be maintained, appeared as a witness in his own behalf, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Zangerle:

Q. Would you please tell the Court your name? A. Harry J. Lehman, L-e-h-m-a-n.

Q. Mr. Lehman, what is your address? A. My residence address is 3295 Braemar Road, City of Shaker Heights, Ohio.

Q. What form of residence dwelling is that, Mr. Lehman? A. This is a single family residence. I live there with my wife and family.

Q. Are you an owner of this dwelling? A. Yes, my wife and I are record title owners to the property.

Q. Are you, therefore, a taxpayer? A. Yes, we pay real estate taxes to the City of Shaker Heights, School Board and other organizations.

Q. What is your age, please? A. I am 35. [19]

Q. Are you a registered voter? A. I am a registered voter in Cuyahoga County, Ohio.

Q. Of what municipality? A. Well, I am registered from my residence in Shaker Heights.

Q. I see. And can you tell us what State of House Representatives District you are registered in? A. I reside in what is known as District 56, among 99 Districts in the State of Ohio.

District 56 consists of a number of municipalities. Shaker Heights, University Heights, Warrensville Heights, Beachwood, Pepper Pike, Hunting Valley, Chagrin Falls, Solon, Woodmere, Orange, Willow, Bentleyville and North Randall—perhaps one or two more. There are about 112,000 people reside in this district.

Q. Mr. Lehman, are you presently involved in any political activities? A. Yes, I am candidate for the office of State Representative in District 56.

Q. Is your candidacy opposed? A. Yes, I have an opponent.

Q. When will be the date of the election that will determine the results of this campaign? A. It is scheduled for Tuesday, November 3, 1970.

Q. What methods are you using to promote your candidacy? [20] A. We are using various methods, including newspaper advertising in the daily newspapers that service our community, and the weekly newspapers such as the Sun-Press and the Catholic Universe Bulletin, Jewish News, and University Heights Town Crier.

We plan to use direct mail advertising, postcards, and circulars of various types.

We do not presently contemplate use of radio or TV advertising because we just don't plan to use that.

We also were involved in direct contact with the prospective voters door to door, attendance at meetings, participation in panel discussions and various direct contacts with the residents of the Shaker Heights area and other communities in District 56.

Q. Mr. Lehman, are you doing any advertising on the mass transit? A. I have sought to purchase advertising space on the Shaker Heights Rapid Transit which comes right into my district, and as far as I am able to tell the vast majority of its six to eight thousand riders each day are residents of the district, City of Shaker Heights, and surrounding communities constitute the 56 House District.

I sought to purchase advertising by calling this Metrotransit Division, talking to Mr. Adams, who is present [21] today in Court, back early in — late in June or early in July of this year. I asked him if there was advertising space available for the period of August 15th through November 15th, and he advised me that there was.

I asked as to the rates for advertising and he informed me that the rates, I believe, without referring to my notes, were approximately $2.90 per card per car, and that the Shaker Heights Rapid Transit operated 55 cars, and that if you bought the advertising for a three-month period, the rate was somewhat less than $2.90 per car.

Then, of course, the advertiser has to supply the posters to go in the advertising space and those were, I was informed at the time, submitted to the Metrotransit Division for their review and approval.

I did seek to purchase advertising on behalf of my campaign committee and was informed at the time that Shaker Rapid Transit did not accept political advertising. I then wrote to Mayor Jones, of the City of Shaker Heights and asked him if the City would accept political advertising, and change the policy that Mr. Adams had explained to me existed.

Mr. Jones courteously replied in writing that the City was not prepared to change the policy.

MR. ZANGERLE: Mark these [22] Plaintiff's Exhibits 1 and 2.

(Plaintiff's Exhibits 1 and 2 were marked for identification.)

By Mr. Zangerle:

Q. Mr. Lehman, I believe you said you had had some correspondence between yourself and an official of Shaker Heights. I now hand you what has been marked for identification, Plaintiff's Exhibit 1, and I would like you to identify that to the Court. A. This is a copy of my letter dated July 13, 1970, addressed to Honorable Paul K. Jones, who was Mayor of Shaker Heights, which includes my request that the City change its policy of not accepting political advertising in the Shaker Heights Rapid Transit.

Q. Now, I will hand you what has been marked for identification by the court reporter as Plaintiff's Exhibit 2, and I would like you to identify that for the Court. A. This is a copy of the letter, reply letter from Mayor Paul K. Jones, to myself, dated July 22, 1970, responding to my letter of July 13, 1970.

MR. ZANGERLE: Mark this Plaintiff's Exhibit No. 3.

(Plaintiff's Exhibit 3 was marked for identification.)

[23]

By Mr. Zangerle:

Q. Mr. Lehman, did you at any time submit your advertising copy or program to the officials of Metromedia, or Metrotransit Advertising? A. Yes. I was advised by, I believe it was Mr. Hibbs of that company that all advertising, and particularly political advertising had to be reviewed by them as to content and design.

They submitted to me a set of rules and regulations that they publish governing the acceptance of political advertising and we had our artist prepare the poster that we wanted to have on the Shaker Heights Rapid Transit advertising space, and submitted it to them, to them being the Metromedia, and it was approved.

Q. Mr. Lehman, I hand you what has been marked for identification Plaintiff's Exhibit No. 3. Would you please identify that for the Court? A. Yes, this is the art work of the proposed advertising that we planned to, desired to run in the Shaker Heights Rapid Transit. It speaks for itself.

It was okayed by Thomas Hibbs, I believe his name is, and initials M. T. A., when we submitted it to him through the artist, Harry Levy, some two or three weeks ago.

Q. Now, are you aware that this was approved by the [24] officials of Metrotransit? A. It carries the signature

of the gentleman who was the General Manager of Metrotransit in this area.

MR. ZANGERLE: Your Honor, that will conclude our direct examination of Mr. Lehman.

THE COURT: Are you offering those as exhibits?

MR. ZANGERLE: Mr. Lehman will offer those at the conclusion of the testimony.

THE COURT: Mr. Kelley, do you care to cross-examine?

MR. KELLEY: No, I have no questions, your Honor.

THE COURT: Mr. Madsen?

MR. MADSEN: Your Honor, I have just a couple of questions.

Cross-Examination

By Mr. Madsen:

Q. Mr. Lehman, you did name your opponent as candidate for the State Legislature? A. My opponent is a gentleman by the name of Richard Hollington, who I believe is a lawyer with the firm of Baker, Hostetler and Patterson. **[25]**

Q. Do you know if he has made any effort to obtain the right to place political advertisements on the Shaker Rapid? A. No, sir, I do not have any knowledge of any kind as to what his political campaign is, or what he plans.

Q. You had mentioned various communities which are part of District 56. Do any of those communities, other than Shaker Heights, have any form of public transportation? A. Yes.

Q. Which are those, please? A. I believe the Cleveland Transit System services the City of University Heights, also services the City of Shaker Heights, services, I believe, the City of Warrensville Heights. Wheth-

er it goes to Solon or Chargin Falls, I just don't know, sir.

Q. Have you made any efforts to date to place political advertising upon the C.T.S. transportation system? A. At the time I talked with Mr. Adams, back in late June or early July—

Q. I don't believe that is responsive to my question. A. Yes, I believe it is, sir, if I may attempt to continue my answer. He advised me that C.T.S. did have political advertising available, and I did inquire as to its availability and as to the rates, and because of the manner in which advertising is accepted, political [26] advertising is accepted — or any advertising, as I understand — by C.T.S. we decided not to purchase advertising space with C.T.S. because of the cost.

Q. Isn't it true you were told C.T.S. does not accept local political advertising? A. No, sir, I have never at any time been informed that that is the case. The rules received pertaining to political advertising from Metromedia, have no reference to that either.

Q. Do you have a copy of those rules with you? A. Yes, I do.

Q. Would you produce those?

THE WITNESS: Mr. Zangerle, would you provide a copy?

By Mr. Madsen:

Q. When were you provided with the document Mr. Zangerle has just offered me? A. I cannot give you an exact date, but it was probably some time during the month of July. It could have been early in August. It was prior to the time of submission of the proposed advertising which is Exhibit 3.

Q. Was it given to you by Mr. Hibbs of Metrotransit Advertising? A. No, it was given to the artist who did the work [27] representing Exhibit 3, Harry Levy, of Market Advertising Agency.

It was given to him by Mr. Hibbs, and, in turn delivered to me by Mr. Levy.

Q. When was it delivered to you by Mr. Levy? A. About — again I cannot state exactly the date but I believe it was the end of July or early August.

Q. But it is your understanding that this document recites the policy with respect to the acceptance of political advertising on public transportation by Metrotransit Advertising? A. Yes, sir, and I spoke with Mr. Hibbs about it, and that was his representation he made to me.

MR. MADSEN: I will ask the reporter to mark the document handed to me by Mr. Zangerle as Defendant Metromedia's Exhibit A.

(Defendant Metromedia's Exhibit A was marked for identification.)

By Mr. Madsen:

Q. Handing you what has been identified as Metromedia's Exhibit A, would you read to the Court the last item thereon, which is number ten? A. Would you like me to identify it?

Q. Yes, if you would.

I thought you had already identified it. [28] A. I hadn't seen the document we were discussing.

This is the Metrotransit Advertising Copy Policy, which I did receive from Mr. Levy, from Mr. Hibbs to him, and specifically, Item 10:

"Political advertising will not be accepted on following systems: Shaker Rapid—Maple Heights—North Olmsted."

MR. MADSEN: No further questions.

By Mr. Kelley:

Q. You said you had never been told C.T.S. doesn't accept local political advertising. You do recall in Judge McMonagle's chambers, Mr. Madsen's inquiry of Mr. Hibbs, what the policy was and receiving the report that C.T.S. does not accept local political advertising? A. I recall the discussion at one time that C.T.S. did not accept local political advertising. Judge McMonagle stated a few years ago when he was a candidate for Judge, he sought to purchase advertising on C.T.S., and it was not accepted.

Q. Don't you recall that Mr. Madsen returned from speaking to Mr. Hibbs, with the report that C.T.S. does [29] not accept local political advertising now or at the time when Judge McMonagle was running for office? A. It was my understanding what the statement was, but—I certainly stand to be corrected—that that was the policy and is not presently the policy.

But I have some difficulty with the concept of what local political advertising is, because my wife reported that very day she saw a Judge Talty sign, which is a Common Pleas Judgeship, on a C.T.S. bus going through Shaker Heights that very day, which covers the same jurisdiction as Judge McMonagle.

MR. KELLEY: I object to the last part of that answer as not being responsive to the question.

THE COURT: Objection sustained.

Stricken.

Q. My question was, wasn't it reported back to Judge

McMonagle, by Mr. Madsen, after speaking to Mr. Hibbs, that the policy of C.T.S. was not to accept local political advertising, whatever the means? A. My understanding of Mr. Madsen's report was that that had been the policy. And my understanding was not at the time that currently is the policy, but, as I indicated, I stand to be corrected if we have someone— [30]

MR. MADSEN: Your Honor, I think perhaps a professional statement would be in order at this time because the question did arise in the hearing which was held in chambers before Judge McMonagle as to what the present policy of C.T.S. is, and the Judge—

THE COURT: We are on cross-examination of a witness. So as not to confuse the record, we can have the professional statement after cross-examination.

MR. MADSEN: All right. Thank you, your Honor.

MR. KELLEY: I have no further questions, your Honor.

THE COURT: Did you have any more cross-examination?

MR. MADSEN: Yes, your Honor.

As I say, the question arose at the time of the hearing on the temporary restraining order before Judge McMonagle, as to what the present policy of the C.T.S. System is.

Judge McMonagle expressed great surprise that there would be any advertising accepted, because he personally, in one of his campaigns, had sough to purchase such advertising and wasn't successful. [31]

THE COURT: I was calling on you if you had any further cross-examination?

MR. MADSEN: I have no further cross-examination.

THE COURT: Do you have any redirect?

MR. ZANGERLE: No, I don't.

I was just objecting.

THE COURT: Now, you may continue with what you were saying.

MR. MADSEN: In order to ascertain what the present policy was, Judge McMonagle asked if I could find out. Mr. Hibbs, who was then the local manager of Metromedia Advertising, was in the courtroom, because the hearing was being held in chambers with only counsel present.

I went out and asked Mr. Hibbs what the policy was, and he told me at that time that the present C.T.S. policy was that they would not accept political advertising, having anything to do with a local campaign.

I then returned to Judge McMonagle's chambers and made that statement in the presence of all counsel, including Mr. Lehman, namely, that [32] the policy of the C.T.S. is that they will not accept local political advertising.

THE COURT: I don't know what "local" means. C.T.S. is owned by the City of Cleveland, so it may be limited to within the City of Cleveland. I don't know what the word "local" means for a transit system which traverses various municipalities within the boundaries of Cuyahoga County.

Any further testimony?

MR. LEHMAN: Yes, your Honor, I believe in that Mr. Madsen has made a statement for the record, that I may, for purposes of the record, make at least two comments on that.

One is there was no hearing. There was a conference in Judge McMonagle's chambers with the lawyers, without the clients, in which it was agreed by the parties that the matters would be combined.

I don't know if you viewed it as a hearing, but I did not, sir.

THE COURT: I think he said that they were in chambers.

MR. LEHMAN: He said we had a hearing. [33]

THE COURT: And Judge McMonagle asked him to go out and obtain from somebody who wasn't in there—the parties to the lawsuit were not in chambers—asked him to go out and get some information. He went out and got it, and relayed it to Judge McMonagle.

MR. LEHMAN: I think the Court should be aware, so if the conversation between counsel and the Judge in chambers becomes an issue in this case, I think the Court should also be aware that—

THE COURT: I don't think it makes any difference what the C.T.S. policy is.

MR. LEHMAN: That was the next point I was going to make that the C.T.S. policy is not on issue before this Court.

THE COURT: It is a question of whether this policy of Shaker Heights is in violation of the constitution.

MR. LEHMAN: I do have one further witness, and would like to call Mr. Adams to the stand, please.

THE COURT: Is this for cross-examination under the statute?

MR. LEHMAN: Yes. [34]

THEREUPON the Plaintiff, further to maintain the issues on his part to be maintained, called as a witness for cross-examination under the statute LEONARD M. ADAMS, who, being first duly sworn, was examined and testified as follows:

Cross-Examination

By Mr. Lehman:

Q. May I have your name? A. Leonard M. Adams.

Q. And your place of residence? A. 10225 Chesterfield Drive, Parma Heights, 44130.

Q. Your place of employment, sir? A. Metromedia Transit, a Division of Metromedia.

Q. What is your position with that agency? A. Sales Manager.

Q. How long have you been with them? A. I have been with Metromedia since October of 1966.

Q. How long have you been with the Metrotransit Advertising Division in Cleveland? A. I have been selling Transit Advertising for ten years, under the original owners, who were Ryan & Batchelder.

Q. Does your company maintain offices in Cleveland? [35] A. Metromedia?

Q. Yes. A. Yes.

Q. Where are they located? A. 3134 Euclid Avenue.

Q. That is where your office is located? A. That is right.

Q. And your company is the exclusive agent for the sale of advertising space on the Shaker Heights Rapid Transit? A. That is right.

Q. Do you have with you, sir, permission pertaining to the availability of advertising space on the Shaker Heights Rapid Transit? A. I do.

Q. Could you tell me how many advertising positions there are on a Shaker Rapid Transit car? Inside the car? A. I would say approximately 20.

Q. Inside the car? A. Inside.

Q. Is there advertising space available on the outside of the cars well? A. Yes.

Q. Is it correct that there are approximately, or are 55 cars in service on the Shaker Heights Rapid Transit? [36] A. Yes.

Q. Is there space currently available for commercial advertising? A. Yes.

Q. For the month of September, 1970? A. Inside?

Q. Inside. A. Yes.

Q. For the month of October, 1970? A. Yes.

Q. For the first two weeks of November, 1970? A. Yes.

Q. Does Shaker Heights Rapid Transit accept advertising from cigarette companies? A. Yes.

Q. Does it accept advertising from banks, and savings and loans? A. Yes.

Q. Does it accept advertising from liquor companies? A. Yes.

Q. Does it accept it from various retail rug cleaning companies, or people selling retail goods or services? A. Yes.

Q. Is there any type of commercial advertising which it will not accept, so long as the copy or contents of the [37] ad is acceptable? A. Will you state that again?

MR. KELLEY: I don't understand the question, your Honor.

MR. LEHMAN: Would you read the question back to the witness? If it is not clear to you I will rephrase it.

(Question read by the reporter.)

THE WITNESS: Can I ask a question?

MR. LEHMAN: Yes.

THE COURT: Yes.

THE WITNESS: When you say "commercial advertising," are you referring to product sales?

Q. Yes. A. Only?

Q. Product or service? A. Or service. Are you referring to political advertising now?

Q. No, sir, non-political commercial advertising. Is there any group or class of product that is non-political

but is commercial, that the Transit System will not accept? A. No.

Q. I have observed, in riding the Shaker Heights [38] Rapid Transit, that there is church advertising on the Shaker Heights Rapid Transit. Is that paid advertising? A. Yes.

Q. I also observe there are numerous, what might be called civic or public oriented type of advertising such as The Peace Corps, Care, or charitable organizations, Muscular Dystrophy, something like that.

Now, is this paid advertisement by these agencies? A. With the exception of the "Smokey the Bear", if you will, or anything that pertains—that we could get space from, from the Government, this is put in for free, at no charge.

However, the other public service, your Muscular Dystrophy, your Boy Scouts, your Girl Scouts, PAL organization, Police Athletic League, those are put in by labor costs only, which the labor costs are redeemed by our head officers.

Q. So that is at a rate substantially less than your commercial advertisers? A. No charge at all, except for labor.

Q. And the labor has to do with placing the posters in the vehicle? A. That is correct.

Q. I hand you what has been previously marked for identification as Defendant Metromedia's Exhibit A, [39] and I ask you if that is currently the policy of the Metromedia pertaining to advertising? A. Yes.

Q. Would you read to the Court, paragraph 2 of this document? A. "Metrotransit Advertising will not accept any political copy that pictorially, graphically or otherwise states or suggests that proponents or opponents of

the persons or measure advertised are vulgar, greedy, immoral, monopolistic, illegal or unfair."

Q. I hand you what has been marked for identification Plaintiff's Exhibit 3, and ask you if you recognize this, and Mr. Hibbs' signature in the lower right-hand corner? A. I do.

Q. I trust that his signature means that insofar as the copy on that advertising is concerned, it passes muster? So far as the standards of your agency that you just read? A. Yes.

Q. Do the rates of $2.95 per month per card, on a monthly basis, and $2.80 per month per card on a three-month basis, still apply as of the current date, on Shaker Heights Rapid Transit? A. Yes. [40]

Q. These are for cards of 11 inches by 28 inches, I believe? A. Yes.

Q. That you have a larger card that is at a different rate? A. Yes.

MR. LEHMAN: I have no further questions of this witness, your Honor.

THE COURT: Any cross-examination?

MR. KELLEY: That was cross-examination.

THE COURT: That is right. He was called for cross-examination.

All right, you may step down.

(Witness excused.)

THE COURT: Anything further on behalf of the plaintiff?

MR. LEHMAN: No. At this time, I would like to offer in Evidence Plaintiff's Exhibits 1, 2 and 3.

THE COURT: Any objection?

MR. LEHMAN: And we have no objection to—I trust you will offer Defendant's [41] Exhibit A because we had

intended to have it marked and identified as part of Mr. Adams' examination.

MR. MADSEN: If you intend to offer it, you had better offer it.

MR. LEHMAN: I offer in evidence Defendant Metromedia's Exhibit A.

THE COURT: I never heard of that, but if you want to, mark it for yourself also. It seems to me the defendant has to offer its own exhibits.

MR. LEHMAN: That was my understanding, and that is why I turned to Mr. Madsen. Or I will recall Mr. Adams to the stand, or we can make this a Joint Exhibit.

THE COURT: Now, I am on Plaintiff's Exhibits 1, 2 and 3. And I am asking if opposing counsel have any objection to receiving any of those.

MR. KELLEY: Your Honor, I would object to Exhibit 3. I think the exact copy submitted by the plaintiff in this case is not at issue and it is not relevant to the issues in the case.

MR. MADSEN: We have no objection.

THE COURT: We will proceed. Particularly in light of the cross-examination, [**42**] in which Mr. Adams identified the signature or mark of Mr. Hibbs.

(Plaintiff's Exhibits 1, 2 and 3 were received in evidence.)

THE COURT: Now, Mr. Madsen, what about Defendant Metromedia's Exhibit A?

MR. MADSEN: We do not intend to offer it, your Honor.

MR. LEHMAN: Your Honor, may I recall Mr. Adams to the stand so this may be marked for identification?

THE COURT: You don't have to. You may have it marked for your exhibit, Plaintiff's Exhibit 4.

MR. LEHMAN: Would you mark this as Plaintiff's Exhibit 4, please?

(Plaintiff's Exhibit 4 was marked for identification.)

MR. LEHMAN: I am offering the entire Plaintiff's Exhibit 4.

THE COURT: Any Objection?

MR. KELLEY: Your Honor, at the moment, I am going to object and ask the Court to reserve judgment on this. **[43]**

THE COURT: Let me see Exhibit 4.

MR. KELLEY: I would like to bring out on further testimony, your Honor, that there is an incorrection on Exhibit A, and after I bring it out, I may have no objection to having it admitted.

THE COURT: All right. We will reserve on that.

Is the plaintiff resting?

MR. LEHMAN: Yes.

THE COURT: Any testimony on behalf of Shaker Heights?

MR. KELLEY: Yes, your Honor. I will call Mayor Jones to the stand.

[44]

DEFENDANT SHAKER HEIGHTS' CASE

THEREUPON the Defendant, The City of Shaker Heights, to maintain the issues on its part to be maintained, called as a witness PAUL K. JONES, who, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kelley:

Q. State your name, please? A. Paul K. Jones.

Q. Where do you live? A. 3333 Warrensville Center Road.

Q. City of Shaker Heights? A. In the City of Shaker Heights.

Q. Are you the defendant in this case, Mayor of the City of Shaker Heights? A. Yes.

Q. How long have you been Mayor of the City? A. Since 1962.

Q. And what was your employment or occupation prior to your service as Mayor to the City? A. I was employed as Director of Transportation, by the Mayor of Shaker Heights in September of 1944. Prior [45] to that I had been assistant general manager of the Rapid Transit since 1930.

Q. When you were employed in 1930, in connection with the operation of the Rapid Transit, was it then privately owned? A. It was privately owned, yes, sir.

Q. How long has it been a public facility? A. Since September 6th, 1944.

Q. Will you tell the Court what the policy of the transit system has been, as both a private facility and a public facility, since 1930, with respect to political advertising? A. The policy, to the best of our—

MR. LEHMAN: Excuse me, I would enter an objection only as to when it was a private system. I have no objection to his testimony as to the public system.

MR. KELLEY: For what it is worth, I would like the record to show what the policy has been since Mr. Jones has been connected with the system.

THE COURT: All right. Objection overruled.

THE WITNESS: It has been my recollection that the policy has been, all [46] these years, we never entertained any political advertising.

Q. What year did you say it became the property of Shaker Heights? A. September, 1944.

Q. Since that occurred, during the past 26 years of public operation, has it been the policy of the City of

Shaker Heights not to accept or permit political advertising on the Rapid Transit vehicles or other property? A. That has been the policy, yes.

Q. There has been introduced in evidence the present contract with the Metromedia, between the City of Shaker Heights and Metromedia, with respect to the exclusive agency for advertising.

Has that contract—does it now, and has it in the past, provided specifically that there would be no political advertising accepted? A. That is right. The present contract and those preceding that had that clause in, at least for two or three terms, I am sure.

Q. Prior to the time that it was expressly or specifically written into the contract, was it the oral understanding and the practice and policy of the City not to accept political advertising? [47] A. That is right.

Q. During that 26 year period has there been any objection or complaint with respect to the enforcement of this policy or practice?

MR. LEHMAN: Objection.

THE COURT: Objection sustained.

Q. Mayor Jones, will you tell the Court what the reason for the policy is, as far as the City's point of view is concerned, and your point of view as Mayor, if you will, what is the reason behind the administration and the counsel adopting and enforcing a policy of no political advertising on the Rapid Transit? A. Well, it has been our policy for, I say, all these years, for many reasons but principally because there are chances for abuse. You could be accused of discrimination, favoritism. If I may go back a few years, I am sure your Honor when Fred Kohler was Mayor of Cleveland and we had benches all over town and it said, "Kohler, your Mayor," and so forth.

Someone might want to take Rapid Transit and put poster all over. As I say, that is where the abuse comes in. So I say it has been our policy all these years to take no advertising and then there could be no problem of favoritism or discrimination and keep the property clean.

[48]

MR. KELLEY: Nothing further.

THE COURT: Any cross-examination?

Cross-Examination

By Mr. Lehman:

Q. I have just one question. This is the policy of the City of Shaker Heights that you have articulated, that there will be no political advertising. This is not a policy imposed on the City by an independent agency, is it? A. No. It is the policy of the City.

MR. LEHMAN: No further questions.

Redirect Examination

By Mr. Kelley:

Q. Mayor Jones, when you refer to the policy of the City is this a policy recommended by your Administration and adopted and enforced by your Administration, as a result of Council action? A. That is right. This has been my recommendation to the former Mayors and to our present Council and so forth. [49]

Q. Did the Council adopt that policy as part of the agreement with Metromedia? A. Yes, they did.

THE COURT: Does Metromedia have any questions?

MR. MADSEN: No, we do not.

THE COURT: Anything further?

MR. KELLEY: I would like to recall Mr. Adams to the stand for further questioning.

THE COURT: Is this for cross-examination or direct?

MR. KELLEY: Well, we will call it direct. It doesn't make much difference to me.

[50]

THEREUPON the Defendant, the City of Shaker Heights, further to maintain the issues on its part to be maintained, called as a witness LEONARD M. ADAMS, who, being previously duly sworn, was examined and testified further as follows:

Direct Examination

MR. KELLEY: Let the record show that Mr. Adams, who has previously testified has been called back to the stand.

By Mr. Kelley:

Q. Mr. Adams, you are presently the Sales Manager of Metromedia Transit in Cleveland? A. I am.

Q. How long have you held that position? A. I have been Sales Manager since last October of 1969.

Q. Who was Mr. Thomas K. Hibbs? A. Tom Hibbs—

Q. Or what position did he hold in Cleveland recently? A. Tom Hibbs was the General Vice-President and General Manager of the Cleveland Branch, Vice-President and General [51] Manager.

Q. Was he your immediate superior?. A. Yes.

Q. And has he now left Cleveland for another position with the company? A. Tom Hibbs left last Friday for San Francisco. He went back home as Sales Manager.

Q. If I tell you that as of August 14, 1970, in a letter to Mayor Jones from Mr. Hibbs, "Reference is made to the fact that Shaker Heights —"

MR. LEHMAN: I object.

MR. KELLEY: May I finish the question, your Honor?

MR. LEHMAN: Its premise is hearsay, "If I tell you in a letter from Mr. Hibbs to Mayor Jones" —

THE COURT: If it is hearsay, of course, it is objectionable.

MR. KELLEY: All right.

Mark this Defendant Shaker Heights Exhibit A.

(Defendant Shaker Heights' Exhibit A was marked for identification.)

By Mr. Kelley:

Q. Handing you what has been marked for identification [52] Defendant Shaker Heights' Exhibit A, does that distinctly advertise the policy of Metromedia? A. Yes.

Q. Does that appear to you to be similar, or the same copy as Plaintiff's Exhibit 4 and Defendant Metromedia's Exhibit A?

Just basically, does that generally appear to be the same thing? A. Yes.

Q. Now, you notice in the last line on the Defendant Shaker Heights' Exhibit A, the words "Euclid, Ohio," has been written in, among the list of public transportation systems for which political advertising is not accepted. Do you notice that? A. Yes.

Q. Is the inclusion of Euclid, Ohio, in that list a correct indication of the present policy enforced by your company with respect to the Euclid Transit System? A. Yes.

MR. KELLEY: On that basis, I would like to substitute Defendant Shaker Heights' Exhibit A, in place of Defendant Metromedia's Exhibit A, on the basis that the inclusion of Euclid, after the words Shaker Rapid, Maple Heights and North Olmsted, is a correct expression of the [53] political advertising policies in effect at the present time.

THE WITNESS: That is correct.

Q. Is that correct? A. That is correct.

THE COURT: All right. It may be received.

(Defendant Shaker Heights' Exhibit A was received in evidence.)

By Mr. Kelley:

Q. Mr. Adams, is it also correct that the Cleveland Transit System, while it permits State and National political advertising, does not accept advertising for local political candidates? A. That is right.

Q. Is that your understanding of the present policy of C. T. S.? A. Yes, that is correct.

Q. Is it your further understanding that other cities in the country, such as Detroit, and some other suburban systems throughout the country, enforce the same policy of not accepting political advertising on public transit systems? A. Yes. That is right.

MR. KELLEY: Nothing further, [54] your Honor.

Cross-Examination

By Mr. Lehman:

Q. Mr. Adams, what is a local office? A. Political?

Q. Yes. A. If you are referring to the Cleveland Transit System —

Q. Yes. A. — local political offices, as told to us, are the Mayors, Judges, Councilmen, County Commissioners. We accept on the Cleveland Transit System state level and up, political advertising. Issues, we accept issues.

Q. The State Assembly is a State office? State Senate is a State office? A. You are telling me this?

Q. If you are serving in Columbus, in a State office? A. Yes.

Q. I want to know under your advertising policy —

A. We accept that.

Q. You accept those.

Is it not true that Metromedia administers advertising sales programs on transit systems throughout the country? Is that correct? A. That we do administer?

Q. Yes. A. Yes, we do.

Q. You have contracts not only in Cuyahoga County, but you have contracts with municipally operated transit systems throughout this country? A. Yes.

Q. Your company is probably the largest in this field, is it not? A. Yes.

Q. Is it not true that in many of these communities the political advertising of every type, nature and description, so long as it meets the criteria you read earlier, is accepted? A. Yes.

Q. Is it not true that in each and every instance the policy as to whether any political advertising shall be accepted is a policy established by the owner of the Transit System? A. Yes.

Q. Is it not true that if you were permitted to sell political advertising, that Metromedia and the City of Shaker Heights would receive revenues from the sale of that advertising?

MR. KELLEY: Objection.

[56]

MR. MADSEN: Objection.

THE COURT: Objection sustained.

That is an ify thing.

Q. In the cities in which you do sell political advertising as distinguished from commercial advertising, does the owner of the Transit System receive money, payment for that advertising?

MR. KELLEY: Objection.

THE COURT: Overruled. You may answer. A. Yes.

Q. And the agency earns a commission on the sale of that advertising? A. Yes.

MR. LEHMAN: I have no further questions.

By Mr. Madsen:

Q. Mr. Adams, you were examined with respect to —

MR. LEHMAN: Your Honor, unless —

is this a joint defense?

MR. MADSEN: He was called on [57] direct, as I understood it, by Mr. Kelley and I have the right to cross-examine.

MR. LEHMAN: You are cross-examining your own client?

MR. MADSEN: For the purpose of clarification, I think I have the right to, sir.

MR. LEHMAN: All right. Just so the record so shows.

By Mr. Madsen:

Q. For purposes of clarification, Mr. Adams, handing you what has been marked for identification Defendant Shaker Heights Exhibit A, you testified, as I understand it, that that is the policy of Metrotransit Advertising. Is that correct? A. That is correct.

Q. Is that a policy which Metrotransit Advertising abides where it sells advertising on public conveyances? A. Yes.

MR. LEHMAN: I have nothing further.

THE COURT: Anything further on behalf of Shaker Heights?

MR. KELLEY: Nothing further.

[58]

THE COURT: Anything further on behalf of Metromedia?

MR. MADSEN: Nothing further.

THE COURT: Anything further on behalf of the plaintiff?

MR. LEHMAN: Yes, your Honor.

For matters of clarification we offered Plaintiff's Exhibit 4, which was identified by the plaintiff as that which he received from the defendant Metromedia setting forth their advertising policy. There since has been identified Defendant Shaker Heights Exhibit A, which is the same document, with the addition of the words typed on as distinguished from mimeographed or printed on, "Euclid, Ohio", under paragraph 10.

You didn't ask me what my view was at the time Mr. Kelley offered this into evidence. I have no objection to Defendant Shaker Heights Exhibit A, but I would think that both of them should be accepted into evidence. We are prepared to accept Mr. Adams testimony that the Euclid Municipal System has a policy similar to Shaker Heights, but I think for the purpose of the record they both should be made part of it, and therefore [59] we offer Plaintiff's Exhibit 4.

MR. KELLEY: I have no objection, your Honor. It is a small point. I simply wanted the record to show the correct facts.

THE COURT: I will receive it without objection.

(Plaintiff's Exhibit 4 was received in evidence.)

MR. LEHMAN: We have nothing further.

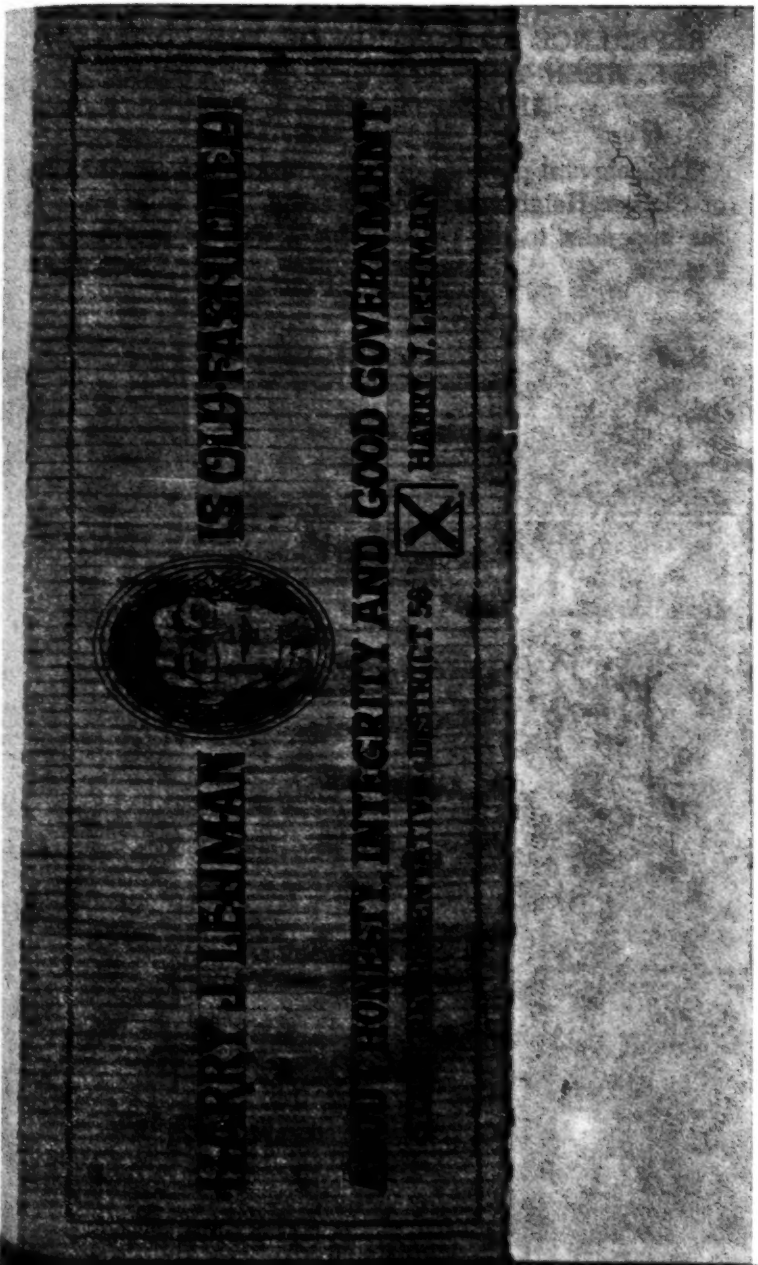
THE COURT: Does anyone want to argue, or will you submit it on briefs?

MR. KELLEY: I am perfectly willing to let the matter rest here and submit it on briefs, your Honor, and we will have our brief filed as soon as possible, not later than Thursday.

THE COURT: All right. Thank you, gentlemen.

(Hearing adjourned.)

Proposed Advertising Copy



REFERENCE TO PORTION OF THE CONTRACT BETWEEN THE CITY OF SHAKER HEIGHTS AND METROMEDIA, INC.

The relevant portions of the contract between the City of Shaker Heights and Metromedia, Inc., is printed in the appendix to the petition for a writ of certiorari at 24a-25a.

JUDGMENT OF THE SUPREME COURT OF OHIO

The judgment of the Supreme Court of Ohio is printed in the appendix to the petition for a writ of certiorari at 17a-18a.

OPINION OF THE SUPREME COURT OF OHIO

The opinion of the Supreme Court of Ohio is printed in the appendix to the petition for a writ of certiorari at 1a-16a. Justice Corrigan's opinion starts at 3a and Justice Stern's dissenting opinion begins at 7a.

Supreme Court of the United States

No. 73-328 ~~----, October Term, 19-~~

Harry J. Lehman,

Petitioner,

v.

City of Shaker Heights, et al.

Order allowing certiorari. *Filed* November 12, *19* 73

The petition herein for a writ of certiorari to the Supreme Court of the State of Ohio *is granted.*

FILE COPY

FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-328

HARRY J. LEHMAN,

Petitioner,

—v.—

CITY OF SHAKER HEIGHTS and METROMEDIA, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

HARRY J. LEHMAN,

Petitioner,

—v.—

CITY OF SHAKER HEIGHTS and METROMEDIA, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in the proceeding on May 23, 1973.

Opinions Below

The opinion of the Supreme Court of Ohio affirming the Court of Appeals is reported at 34 Ohio St.2d 143 and at 296 N.E.2d 683. It is set forth in the Appendix, *infra,* at pp. 1a-16a. The Journal Entry of the Court of Appeals for Cuyahoga County, Ohio is set forth in the Appendix at pp. 19a-21a. The Journal Entry of the trial court is set forth in the Appendix at pp. 22a-23a.

Jurisdiction

The judgment of the Supreme Court of Ohio was entered on May 23, 1973. This Court has jurisdiction to review the judgment of the Supreme Court of Ohio by writ of certiorari pursuant to Title 28, United States Code Section 1257(3).

Questions Presented

1. Whether the First Amendment precludes a municipality from refusing to sell political advertising when it sells all other forms of paid commercial and non-commercial advertising for display upon a transit system it owns and operates.

2. Whether a municipality, having opened a forum to some type of expression can discriminate against paid political advertisements in favor of paid commercial advertisements.

Constitutional Provisions Involved

1. United States Constitution, Amendment I:

   Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. United States Constitution, Amendment XIV, Section 1:

   All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Petitioner, plaintiff below,[1] a resident of Shaker Heights, Ohio, and at the time of the events which gave rise to this law suit, a candidate for the office of State Representative to the Ohio General Assembly, sought to purchase advertising space on the Shaker Heights Rapid Transit for his political campaign.[2] Defendant Metromedia, the executive advertising agent for Shaker Heights Rapid Transit System, admitted the availability of advertising space for

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[1] Hereinafter the parties will be referred to according to their designation in the trial court.

[2] Petitioner was elected to the Ohio House of Representatives and faces reelection every two (2) years. He therefore still has a valid interest in seeking the right to purchase political advertising on the Shaker Heights Transit System. *See, e.g., Jeanette Rankin Brigade* v. *Chief of the Capitol Police,* 421 F.2d 1090, 1092-1093 (C.A.D.C. 1969); *remanded* 342 F. Supp. 575, 579-581 (D.D.C. 1972); *aff'd* 409 U.S. 972 (1972). As a result, this controversy is not moot in any legal sense. On the contrary, petitioner has a live continuing interest in its resolution despite the passage of the particular election, since it is necessary to settle a practice which is still in force. *Compare Dunn* v. *Blumstein,* 405 U.S. 330, and esp. 333 n. 2 (1972) *with Hall* v. *Beals,* 396 U.S. 45 (1969). Indeed, even voluntary termination of the policy would not create a moot controversy here. *See, e.g., Carroll* v. *Princess Anne,* 393 U.S. 175 (1968); *Lamant* v. *Postmaster General,* 381 U.S. 301 (1965); *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 632 (1953); *Lankford* v. *Gelston,* 364 F.2d 197, 203 (4th Cir. 1966).

August, September and October of 1970, when it would be needed by plaintiff, but, pursuant to its written contract with the City of Shaker Heights,[3] refused to accept the plaintiff's political advertising.

According to the written contract, Metromedia accepts advertising for display on the twenty (20) spaces available within each of the transit system's cars. Metromedia has accepted advertisements for cigarettes, liquor, banks, savings and loans, retail goods and services, as well as churches and certain civil and public service advertisements such as the Girl Scouts, Boy Scouts, Peace Corps and the Police Athletic League. However, Metromedia has, consistent with its written agreement, refused to accept advertisements of a political nature.

The City has stated that the reasons for its policy of not accepting paid political advertisements are: the chance that some might interpret the advertisement as an endorsement of a particular person or idea; the chance for abuse; possibility of discrimination or favoritism; and the risk of violating passengers' rights.

The plaintiff filed a complaint with the Court of Common Pleas for Cuyahoga County, Ohio seeking an injunction and a declaratory judgment declaring defendants' policy to be a violation of his constitutional rights under the First and Fourteenth Amendments to the United States Constitution and under the Ohio Constitution. The trial court denied the request for the declaratory judgment and for a permanent injunction. The Cuyahoga County Court of

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[3] The applicable part of the contract appears in the Appendix at pp. 24a-25a. It was introduced and admitted into evidence as a joint exhibit at page 15 of the record.

Appeals and thereafter the Supreme Court of Ohio, in a four to three decision, affirmed the trial court.

The federal questions tendered herein were presented to the trial court by the complaint and a memorandum of law. The trial court passed on the questions in its journal entry. See Appendix at pp. 22a-23a. Thereafter, the issues were raised in the Court of Appeals for Cuyahoga County, Ohio, and the Supreme Court of Ohio by plaintiff's statements, briefs and arguments.

The Supreme Court of Ohio passed on the federal questions in its opinion, holding:

> Where a municipality has approved the acceptance of commercial advertisements for display in its owned and operated rapid transit vehicles and refuses to accept any political advertisements urging the candidacy of an aspirant to political office, such refusal is not a violation of the candidate's rights of free speech and equal protection under the First and Fourteenth Amendments to the United States Constitution.

Appendix at p. 1a.

Justice Stern, joined by Chief Justice O'Neill and Justice W. Brown, dissented from the majority opinion in all respects. Appendix at pp. 7a-16a.

REASONS FOR GRANTING A WRIT

1. This Court has never directly ruled upon an important question involved here.

One of the questions presented here focuses on a recurring problem of national significance—the right of an agency of the state to limit a publicly owned, commercial advertising forum to only advertising it deems appropriate. While the Court had the opportunity to discuss whether the acceptance of commercial and public service advertising opened a "public forum"[4] in *Columbia Broadcasting Systems, Inc.* v. *Democratic National Committee,* 93 S. Ct. 2080 (1973), it declined the opportunity and held that the doctrine was not applicable in the limited circumstances presented by that case.[5] This case, then, can be the opportunity for this Court to announce, on the one hand, the extent to which *Columbia Broadcasting* affected previous doctrines concerning publicly-owned forums, or, on the other hand, the extent to which its application is limited to the peculiar circumstances of the broadcast media.

In this case, the Supreme Court of Ohio reasoned that because this Court had previously ruled in *Valentine* v.

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[4] The open forum doctrine was recently articulated by the Court in *Police Department of the City of Chicago* v. *Mosley,* 408 U.S. 92, 96 (1972), as follows:

> Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to context alone.

[5] The nature of the public forum doctrine was recognized in dicta by Mr. Chief Justice Burger, writing for the majority of the court in *Columbia Broadcasting Systems, Inc.* v. *Democratic National Committee,* 93 S. Ct. at 2099.

Chrestensen, 316 U.S. 52 (1942), that purely commercial advertising is not protected by the First Amendment, the state could not be considered to have opened a forum for free speech when they have limited the forum to commercial, non-protected, advertising.[6] Of course, such a ruling reverses the traditional view that freedom of speech has a "preferred position" in our system and gives preference to commercial advertising over noncommercial messages. *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Rptr. 430, 434 P.2d 982, 986 (1968). Under the decision below, commercial speech is protected while free speech is left to die in the cold.[7]

2. The decision below is in direct conflict with a score of recent decisions from this Court and other courts setting forth the doctrine that once a state opens a forum for speech, the forum must be held open to all speakers even though the state dislikes the content of some of the speech.

The constitutional doctrine that once a state opens a forum for speech, the forum must be held open to all who

[6] This is the precise argument presented by Justice Burke in his dissenting opinions in *In re Hoffman*, 64 Cal. Rptr. 97, 434 P.2d 353, 358-360 (1967), and *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Rptr. 430, 434 P.2d 982, 990-992 (1968). It is noteworthy that *Wirta* was cited with approval by this Court in *Columbia Broadcasting Systems, Inc.*, 93 S.Ct. 2099 n. 23. *See also Lee* v. *Board of Regents of State College*, 306 F. Supp. 1097 (W.D. Wisc. 1969), *aff'd* 441 F.2d 1257 (C.A. 7th, 1971); *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969).

[7] Additionally, the decision below led to the absurd result that a state agency may *not* prevent private companies from selling political campaign advertising, *Ross* v. *Goshi*, No. 72-3610 (D.C. Hawaii, Dec. 8, 1972), but may itself refuse to do so. *See Martin* v. *City of Struthers*, 319 U.S. 141 (1943); cf. *Saia* v. *New York*, 334 U.S. 558, 561 (1948).

wish to use it, is well established. The state is prevented by the First Amendment from banning the use of the forum simply because it finds the views expressed to be abhorrent. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Department of City of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972). *See also, Danskin* v. *San Diego Unified School District*, 28 Cal.2d 536, 171 P.2d 885 (1946). Suppression of particular speech because of its content is emphatically not a legitimate governmental interest.

Secondly, where the content of expression is legal, the state's only legitimate interest is in regulation of the time, place and manner under ordinances designed to protect public safety and welfare and narrowly-drawn to insure no discrimination against speech on the basis of subject matter. *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Saia* v. *New York*, 334 U.S. 558 (1948); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939).

Obviously, the subject matter of the speech here, in an advertisement for a candidate for state legislature, is legally protected. The time, place and manner of its presentation would be no different than that which respondents already made available to cigarette and soap companies, and presented no threat to the public safety or welfare.

Certainly it could not be banned for the defendants' stated reasons, that it might invite dispute, *Terminiello* v. *Chicago*, 337 U.S. 1 (1949), especially where the anticipated

debate would be over such an entirely appropriate subject as the relative merits of candidates for public office.[8]

Despite the fact that this Court has repeatedly recognized the open-forum doctrine[9] and other courts have applied the doctrine in several cases directly in point,[10]

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[8] The regulation here cannot even be rationally supported much less meet the requirements of the more exacting compelling state interest test. The defendants have attempted to rationalize their policy on three grounds: (1) The advertisement might be interpreted as an endorsement by the city of the particular person; (2) there exists a reasonable chance for discrimination; and (3) the possible controversial nature of the advertisements might offend their passengers.

As Justice Stern recognized in his excellent dissent, the first of these so-called evils can be negated by requiring a disclaimer on the face of the advertisement. Secondly, the city may not bootstrap itself on the contention that it wishes to avoid favoritism. If it wishes to avoid favoritism, it need only accept political advertisements from all who are willing to pay the applicable rates. Finally, the cities' last contention is adequately answered by this Court's decisions in *Cohen* v. *California*, 403 U.S. 15 (1971) and *Public Utilities Commission* v. *Pollack*, 343 U.S. 451 (1952). See Appendix at pp. 14a-16a.

[9] *See, e.g., Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 93 S. Ct. 2080, 2099 (1973); *Police Department of the City of Chicago* v. *Mosley*, 408 U.S. 92, 96-97 (1972).

[10] The cases that should have been dispositive of this case are: *Danskin* v. *San Diego Unified School District*, 28 Cal.2d 536, 171 P.2d 885 (1946), requiring, in an opinion by Justice Traynor, that the school district make available its building for a public meeting since the district could not arbitrarily deny the right of assembly to those whose political creeds it disapproves; *Hillside Community Church, Inc.* v. *City of Tacoma*, 455 P.2d 350 (Wash. 1969), affirming the lower court's determination that the City of Tacoma could not limit advertising for its transit system in the absence of any substantial showing that the advertisement would be a "clear and present danger"; *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967), holding that city transit authority and private advertising company could not refuse to accept for display in subway stations posters opposing United States participation in the war in Vietnam, also holds that the refusal

the Supreme Court of Ohio turned a deaf ear to plaintiff's request for injunctive and declaratory relief. In short, the decision below can only be characterized as a flagrant rejection of a consistent line of authority and demands review by this Court.

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by the private company was "state action" for purposes of the Fourteenth Amendment. 274 F. Supp. at 441; *Lee* v. *Board of Regents of State Colleges*, 306 F. Supp. 1097 (W.D. Wisc. 1969), declaring that a campus newspaper could not refuse to accept editorial advertisements; *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Rptr. 430, 434 P.2d 982 (1968), holding that public transit district and private corporation which sold advertising on motor coaches could not refuse to accept peace message; *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969), holding that high school students were entitled to place a paid advertisement opposing the Vietnam War in a high school newspaper since the paper was an open forum for dissemination of opinion; *Radical Lawyers Caucus* v. *Pool*, 324 F. Supp. 268 (W.D. Tex. 1970), holding that where the official journal of the State Bar Association of Texas, an agency of the state, accepted commercial advertising and printed editorials and resolutions from its committees, refusal of bar association to accept advertisement of group of radical lawyers constituted denial of free speech and equal protection.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Ohio. In addition, it is respectfully suggested that a summary reversal on the papers is appropriate because the decision by the court below so clearly fails to take into consideration established principles of constitutional law.

Respectfully submitted,

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August 1973

Opinion of the Supreme Court of Ohio

LEHMAN,

Appellant,

—v.—

CITY OF SHAKER HEIGHTS *et al.*,

Appellees.

[Cite as Lehman v. Shaker Heights (1973), 34 Ohio St. 2d 143.]

Constitutional law—Transit advertising—Municipally-owned transit system—Refusal to accept paid political advertising—Paid commercial advertising accepted—Not constitutionally discriminatory—Not violation of free speech—Not violation of equal protection—Article XIV, Amendments, U. S. Constitution—Section 11, Article I, Constitution—Declaratory judgments.

Where a municipality has approved the acceptance of commercial advertisements for display in its owned and operated rapid transit vehicles and refuses to accept any political advertisements urging the candidacy of an aspirant to political office, such refusal is not a violation of the candidate's rights of free speech and equal protection under the First and Fourteenth Amendments to the United States Constitution and Section 11 of Article I of the Ohio Constitution.

(No. 72-389—Decided May 23, 1973.)

APPEAL from the Court of Appeals for Cuyahoga County.

This action for declaratory judgment (R. C. 2721.03) was brought in the Court of Common Pleas of Cuyahoga County. Harry J. Lehman, plaintiff-appellant, sought a determination of whether his constitutional rights, under Section 11 of Article I of the Ohio Constitution, and the First and Fourteenth Amendments to the United States Constitution, were violated by the terms of a written agreement between defendant-appellees, city of Shaker Heights and Metromedia, Inc. (the exclusive advertising agent for the Shaker Heights Rapid Transit System). The agreement was approved by the council of the city of Shaker Heights and, by its terms, Metromedia was prohibited from accepting any political advertisements at any time for display in or upon the Shaker Heights Rapid Transit System.

The evidence adduced at the trial established that, in the period of over 25 years the Shaker Heights Rapid Transit System has been municipally owned and operated, it has been the consistent policy and practice of the municipality to deny use of rapid transit property for political or public-issue advertising.

Appellant, a candidate for the office of State Representative to the General Assembly for District 56 in the 1970 general election, was refused paid political advertising space on the rapid transit system by Metromedia upon the basis of the contract between the city and Metromedia.

Appellant's prayer for a temporary and permanent injunction, restraining defendants from refusing to accept his political advertising on the Shaker Heights Rapid Transit System, was denied by the Court of Common Pleas.

The Court of Appeals affirmed, and the cause is now before this court pursuant to the allowance of a motion to certify the record.

Mr. Harry J. Lehman, in propria persona, and *Mr. Leonard Schwartz.*

Mr. Walter C. Kelley, Jr., director of law, for appellee city of Shaker Heights.

Messrs. Baker, Hostetler & Patterson and *Mr. H. Stephen Madsen,* for appellee Metromedia, Inc.

CORRIGAN, J. We are confronted herein with important issues of constitutional dimension in which appellant urges that the Shaker Heights Rapid Transit System, owned and operated by the city of Shaker Heights, which accepts paid commercial advertising for display in its rapid transit vehicles, may not refuse to accept paid political advertising because such refusal is a violation of a citizen's rights of free speech and equal protection under the First and Fourteenth Amendments to the United States Constitution and Section 11 of Article I of the Ohio Constitution.

The "freedom of speech and press" issue raised by appellant may be succinctly stated: It is whether or not the acceptance of commercial advertisements and their display in publicly owned and operated rapid transit vehicles results in the creation of "forums," such as newspapers, magazines, radio and television, wherein free expression of ideas is constitutionally mandated.

We hold that it does not. As pointed out in the brief of appellee city of Shaker Heights: "A long line of decisions has established the rule that commercial messages do not come within the orbit of First Amendment protection." See

Freedom of Expression in a Commercial Context, 78 Harvard L. Rev. 1119.

In other words, the constitutionally protected right of free speech with respect to forums for oral speech, or the dissemination of literature on a city's streets, does not extend to commercial or political advertising on rapid transit vehicles. Although the city has elected to lease space on its rapid transit vehicles for commercial advertisements, it does not follow that the city must accept political advertisements.

There is an obvious and fundamental difference between transit vehicles and communications media such as newspapers, magazines, radio and television, the primary purpose of each of which is to serve as a forum for the exchange and interplay of ideas. The city has not opened up its transit vehicles to any exchange or presentation of ideas, political or otherwise. The sale of space for commercial advertising in or upon the rapid transit vehicles does not create such a forum, nor does it confer First Amendment rights.

The constitutional language is simple. The First Amendment to the United States Constitution provides:

"Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

Section 11 of Article I of the Ohio Constitution reads:

"Every citizen may freely speak, write, and publish his sentiments on all subjects * * * and no law shall be passed to restrain or abridge the liberty of speech, or of the press. * * *"

The establishment of a commercial advertising program on these rapid transit vehicles was not intended to create

a free speech forum or a free press, and we will not torture these concepts to pressure such a commercial advertising plan into First Amendment ambits. The proponents are confusing free speech forums with the marketplace. Purveyors of goods and services saleable in commerce may purchase advertising space on an equal basis, whether they be house builders or butchers. They are coursing in the stream of commerce. But the Rapid Transit System has determined that political advertising is not acceptable as a matter of long-time policy because of the "chances for abuse, the possibility of discrimination or favoritism, and the risk of violating the passengers' rights." There is no distinction as to candidates. As a class, they are excluded from using the rapid transit vehicles for their political advertising.

It was pointed out by Justice Brandeis, in *Packer Corp. v. Utah* (1932), 285 U. S. 105, 110, that street car advertising is a special class of advertising. The Utah Supreme Court was quoted with approval in the opinion:

"'* * * Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard. These distinctions clearly place this kind of advertisement in a position so that regulations or prohibitions may be imposed upon all within the class. * * *'"

It is well stated in 16 American Jurisprudence 2d 905, Constitutional Law, Section 518, that:

"The general rule that legislation which affects alike all persons pursuing the same business under the same conditions is not such class legislation as is prohibited by constitutional provisions is subject to limitation to the extent that it does not permit discriminations by which persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions. The power of the legislature to impose restrictions on a lawful calling must be exercised in conformity with the constitutional requirement that such restrictions must operate equally upon all persons pursuing the same business or profession under the same circumstances. * * *"

Particular individuals may not be selected from a class or locality and subjected to peculiar rules or have special obligations or burdens imposed upon them from which others in the same class or locality are exempt.

It is stated further in 16 American Jurisprudence 2d 906, Section 518:

"* * * The constitutional guaranty as to the equal protection of the laws * * * requires that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under similar circumstances, and that no greater burdens in engaging in a calling should be laid upon one than are laid upon others in the same calling and condition."

As a class, all candidates for political office are treated alike under the Shaker Heights Rapid Transit System's commercial advertising policy, and that is exactly the ex-

tent of their rights under the constitutions of Ohio and of the United States.

As indicated in *Valentine* v. *Chrestensen* (1942), 316 U. S. 52 (a case involving a commercial message on one side of a handbill and a political message on the other side), the control of *commercial* advertising is entirely within the scope of local government. It seems to follow logically that a local government may regulate the type of commercial advertising it accepts, and that it is within the authority of that local government to accept only commercial advertising, absent a specific holding to the contrary on this question by the Supreme Court of the United States.

Manifestly, there is no denial of equal protection of the laws, as claimed by plaintiff, because everybody in his class as a candidate for public office is treated identically, and his political advertising is not accepted because of policy. Shaker Heights sets plaintiff's class apart from house builders, butchers and other business entrepreneurs who regularly patronize the commercial advertising market and who are the commercial customers of the Shaker Heights Rapid Transit System advertising plan.

For the above reasons, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

HERBERT, CELEBREZZE and P. BROWN, JJ., concur.
O'NEILL, C. J., STERN and W. BROWN, JJ., dissent.

STERN, J., dissenting. This case of first impression in Ohio revolves on the issue of whether a municipality, an arm of state government, is constitutionally prohibited

from forbidding paid political[1] advertisements from appearing at any time in a place which that same arm of state government has deemed to be proper for the display of paid commercial advertisements. I feel that such conduct is constitutionally prohibited.

It should be noted that the issue herein is not whether a municipality must permit advertising of any nature on its rapid transit system. That issue is avoided since Shaker Heights has deemed it proper to encourage the display of paid commercial advertisements on its transit system.

Article 15[2] of the contract between Shaker Heights and Metromedia prohibits Metromedia from accepting political advertisements for display on Shaker's transit system. Such a contract, by an Ohio municipality, constitutes state action[3] subject to the prohibition of Section 11, Article I

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[1] Neither party has elucidated as to the meaning of the term "political" advertisement as used herein. I assume, therefore, that it is restricted to its usual meaning of expression of ideas "pertaining or relating to the policy or the administration of government, state or national." Black's Law Dictionary (4 Ed.). This, of course, would include promoting or urging the defeat of candidates for public office or of issues to be submitted to the electorate.

[2] "15. All advertising matter at any time inserted or placed by the contractor in or upon any of said cars shall be subject to approval by Shaker Heights and shall be of reputable character, and if any immoral, vulgar, disreputable or libelous advertisements are so placed or inserted at any time during the term of this agreement, the contractor will remove the same promptly upon request of Shaker Heights, and if the contractor shall fail to do so, the employees of Shaker Heights may forthwith remove the same. The contractor shall not place political advertising in or upon any of the said cars or in, upon or about any other additional and further space granted hereunder."

[3] I am not concerned herein with conduct by a private citizen or by a private organization. This contract is the direct result of action by a municipal corporation which has been established as an instrumentality of state government.

of the Ohio Constitution. *Peltz* v. *South Euclid* (1967), 11 Ohio St. 2d 128. Such state action also invokes the protection of the First and Fourteenth Amendments to the United States Constitution. *Peltz, supra; Gitlow* v. *New York* (1925), 268 U. S. 652.

Appellant argues that such state action denies him equal protection of the laws, and deprives him of freedom of speech and the press. Before discussing either, I wish to examine the nature of the denial imposed upon appellant.

The use of posters and signs as a method of disseminating information has gained widespread usage throughout this country and this method is widely used for political, commercial, charitable and civic purposes. When accomplished for purely commercial reasons, such method of expression does not constitute speech within the protection of the First Amendment. *Valentine* v. *Chrestensen* (1942), 316 U. S. 52; *Breard* v. *Alexandria* (1951), 341 U. S. 622; *Peltz, supra.*

However, where such method of expression is used for political purposes, it constitutes a vehicle for communication of information and opinion which is not only concurrent with the historic connotation of First Amendment rights, as defined in *Lovell* v. *Griffin* (1938), 303 U. S. 444, but is also concurrent with the concept of assurance of freedom upon which our form of government rests, and the First Amendment protection is neither lessened by the fact that the political message is proposed as a paid advertisement (*New York Times Co.* v. *Sullivan* [1964], 376 U. S. 254, 266), nor that alternative methods of dissemination exist. (*Schneider* v. *State* [1939], 308 U. S. 147, 163.) Accordingly, it is not only in the best interest of government that these methods of communication be encouraged, but it is mandated by our Constitution.

This is not to say that a municipality may not absolutely prohibit the display of advertisements on its rapid transit system or other property under the control of the city. Notwithstanding the free-speech forum which historically exists on public sidewalks and parks, rapid transit systems do not inherently constitute such a forum. Further, the mere creation of a display arena for paid advertisements does not imply that the municipality has waived its right to appropriately regulate advertisements as to time, place, and manner of dissemination. However, such regulations must be in support of an appropriate governmental interest.

There exists, then, a situation in which a municipality has decided to permit paid *commercial* advertisements in a locale in which it entirely prohibits the display of paid *political* advertisements. For that reason, I choose to analyze this case in terms of the equal protection clause of the Fourteenth Amendment.

Although I do not feel compelled to resolve the First Amendment issue, I do feel that that issue cannot be resolved without considering the effect that the allowance of the display of public service advertisements would have on the question of whether a free-speech forum has been created. Such advertisements do not constitute pure commercial communication, and therefore merit consideration on the issue of creation of a free-speech forum.

A fundamental element of the equal protection argument is a determination of whether there is an appropriate governmental interest suitably furthered by the differential treatment afforded these two classes of paid advertisements. See *Chicago* v. *Mosley* (1972), 408 U. S. 92; *Reed* v. *Reed* (1971), 404 U. S. 71; *Dunn* v. *Blumstein* (1972), 405 U. S. 330.

Public facilities have a primary public function or purpose to serve, and the assurance by the municipality of the accomplishment of this function or purpose is properly left to the discretion of that body. Public schools constitute such a facility, having as a primary purpose the education of our children, and while it may not be mandatory that a school auditorium be made available as a forum for the expression of First Amendment ideas, it is certain that it cannot arbitrarily be made available as a forum for the expression of some of these ideas to the exclusion of others.

School auditoriums, however, are seldom used as an arena solely for the dissemination of purely commercial expressions. Consequently, cases involving school auditoriums, public parks, etc., generally involve questions of freedom of speech, necessitating the application of the "clear and present danger" test. See *Terminiello* v. *Chicago* (1949), 337 U. S. 1; *Thomas* v. *Collins* (1945), 323 U. S. 516. Free-speech forums can also be created in regard to other public facilities, including rapid transit systems, for in *Wirta* v. *Alameda-Contra Costa Transit Dist.* (1967), 64 Cal. Rep. 430, 434 P. 2d 982, in addition to allowing paid commercial advertisements to be displayed on the transit system, paid political advertisements were authorized at prescribed times. Thus, a forum for the expression of First Amendment views had been created, and, as that court held, other advertisements expressing opinions and beliefs within the ambit of First Amendment protection could not then be prohibited for reasons of administrative convenience. See, also, *Kissinger* v. *New York City Transit Authority* (S. D. N. Y. 1967), 274 F. Supp. 438.

For additional cases on this and related issues, see *Business Executives' Move For Vietnam Peace* v. *Federal*

Communications Comm. (C. A. D. C. 1971), 450 F. 2d 642; *Danskin* v. *San Diego Unified School Dist.* (1946), 28 Cal. 2d 536, 171 P. 2d 885; *Hillside Community Church* v. *Tacoma* (Wash. 1969), 455 P. 2d 350; *Lee* v. *Bd. of Regents of State Colleges* (W. D. Wis. 1969), 306 F. Supp. 1097; *Zucker* v. *Panitz* (S. D. N. Y. 1969), 299 F. Supp. 102; *Radical Lawyers Caucus* v. *Pool* (W. D. Tex. 1970), 324 F. Supp. 268; *Ross* v. *Goshi* (D. C. Hawaii 1972), No. 72-3610, decided December 8, 1972.

In any event, it is beyond dispute that appellees have created an arena for the display of paid advertising. (*Wirta, supra.*) In deciding to create such an arena, the city examined the detrimental effects which such displays might have on the primary purpose of transporting people, apparently finding that the primary function could be accomplished while gaining the pecuniary advantage of providing space for the display of paid *commercial* advertisements.

I do not discount the possibility that under some circumstances the differing nature of political and commercial advertising might justify permitting one to the exclusion of the other. However, I find no such circumstances herein.

This method of disseminating beliefs and opinions is not dependent upon the *nature* of the subject matter being dispersed, and any legitimate objections which a municipality might have toward the time, place, and manner of dissemination would be the same, whether the nature of the advertisement be commercial, political, or public service. Each advertisement could reasonably be regulated as to such things as size, obtrusiveness, and the time period over which each advertisement may be displayed. Indeed, the

policy followed by Metromedia in regard to other transit systems[4] provides such control now.

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[4] I note, for reference purposes only, appellee Shaker Heights' exhibit A, which sets forth the Metro Transit Advertising Copy Policy as follows:

"(1) Metro Transit Advertising will not display advertising copy that is false, misleading, deceptive and/or offensive to the moral standards of the community, or contrary to good taste. Copy which might be contraryy to the best interests of the transit systems, or which might result in public criticism of the advertising industry and/or transit advertising will not be acceptable.

"(2) Metro Transit Advertising will not accept any political copy that pictorially, graphically or otherwise states or suggests that proponents or opponents of the persons or measures advertised are vulgar, greedy, immoral, monopolistic, illegal or unfair.

"(3) All copy subject to approval. Rough sketches with proposed copy required on all political advertising.

"(4) Metro Transit Advertising reserves the right at all times to decline both sides of any proposition and/or opposing candidates.

"(5) Political advertising must carry, visible within the advertising area of the poster, the tag-line:

" 'Paid Political Advertising Sponsored by . . . ' in letters sized as follows:

"Exterior: 30″ x 144″ King size posters—1″
21″ x 44″ Traveling displays—½″
21″ x 72″ Taillight spectacular—1″
"Interior: 11″ x 28″—¼″ 11″ x 56″—¼″

"(6) Contracts for political advertising space must be accompanied by check for entire amount of contract.

"(7) Posters and/or cards must be delivered, prepaid, 10 days prior to posting date.

"(8) Equal opportunity to purchase space will be offered and allotted for each opposing candidate, bond issue or referendum. If necessary, contracts for political advertising will be held until 30 days prior to the contract posting date, at which time Metro Transit Advertising will allocate the advertising space to each candidate, issue or referendum.

"(9) Minimum order acceptable for either cards or posters is at the one-[month rate].

"(10) Political advertising will not be accepted on following systems: Shaker Rapid—Maple Heights—North Olmsted—Euclid, Ohio."

It follows that, to the extent the city has allowed those disadvantages of commercial advertisng which are identical to disadvantages of political advertising, it is estopped from voicing such disadvantages in support of its absolute prohibition of political advertising.

However, appellees contend that the display of paid political advertisements on the city's transit system presents additional unique disadvantages, such as: (1) They might be interpreted as an endorsement by the city of a particular person or idea; (2) there exists a reasonable chance for abuse, the possibility of discrimination or favoritism; (3) the risk of violating the passengers' rights; and (4) the controversial nature of political advertisements.

That the first of these evils can be negated by requiring a statement of nonendorsement on the face of the advertisement is beyond question. Even in the absence of such a disclaimer, it is doubtful that a political advertisement, as is here contemplated, would be interpreted as an endorsement by the city of a particular candidate or of one side of a particular issue any more than the display of a particular commercial advertisement would be thought of as an endorsement by the city of a particular commercial product.

The conjectured possibility that favoritism might be shown to one party over the other is likewise no justification for this absolute discrimination against paid political advertisements. There being no evidence in the record supporting this contention, I feel that the presumption must be made that those responsible would fulfill their duties in a fair manner. Further, so long as the potential space is made equally available to all who seek it (whether taken advantage of or not, see *Wirta, supra*), there is little chance that only one of the parties would be permitted to

utilize the space. This further negates the possible presumption of endorsement, since all sides of an issue could be advertised.

As to the risk of violating passengers' rights, I acknowledge that to some extent rapid transit passengers constitute a captive audience. As indicated in the majority opinion, magazines and newspapers must be sought out by a reader and radios can be turned off, while advertisements of the sort involved herein "• • • are constantly before the eyes of observers • • •." *Packer Corp.* v. *Utah* (1932), 285 U. S. 105, 110. However, this does not mean that the right of a passenger on a transit system to privacy is not subject to reasonable limitations in relation to the rights of others, for, as stated in *Public Utilities Comm. of D. C.* v. *Pollak* (1952), 343 U. S. 451, 464, "• • • however complete his [a passenger's] right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance." That case held that a transit system could broadcast a radio program within its vehicles, despite the fact that individual passengers could not shut the broadcast off.

The lack of choice of the passengers involved in *Pollak, supra,* is far greater than that involved herein, for these passengers are not compelled to read or even to look at the advertisements. Further, it could not be any less violative of a passenger's rights to "confront" him with commercial advertisements than to "confront" him with political ones.

Finally, I find no evidence to support appellees' contention that either the political advertisement submitted by appellant, or paid political advertisements in general, are of such a controversial nature as to create a potential danger to passengers. Indeed, it is in the interest of better

government that some controversy over political issues be created.

It is my conclusion that where a municipality has created an arena for the display of paid advertisements by providing facilities for such paid advertisements on its rapid transit system, it cannot, in the absence of an appropriate governmental interest, discriminate against paid political advertisements in favor of paid commercial advertisements.

Having determined that the refusal to accept appellant's political advertisement for display constitutes a denial of equal protection contrary to the Fourteenth Amendment, I see no need to further examine the issue of whether a First Amendment forum is created when, by state action, an area of public property is made available for the expression of ideas and beliefs, most of which are not protected by the First Amendment.

I would reverse the judgment of the Court of Appeals.

O'NEILL, C. J., and W. BROWN, J., concur in the foregoing dissenting opinion.

Judgment of the Supreme Court of Ohio

THE SUPREME COURT
OF THE STATE OF OHIO

1973 TERM

No. 72-389

To wit: May 23, 1973

THE STATE OF OHIO,
CITY OF COLUMBUS.

HARRY J. LEHMAN,

Appellant,

—VS.—

CITY OF SHAKER HEIGHTS *et al.*,

Appellees.

APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; for the reasons set forth in the opinion rendered herein,

and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the ..... appellee.... recover from the ..... appellant.... its costs

herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and seal of the Court

this ..... day of ..... 19....

..... *Clerk*

..... *Deputy*

Journal Entry of the Court of Appeals for Cuyahoga County, Ohio

COURT OF APPEALS
OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 30825

HARRY J. LEHMAN,

Appellant,

—VS.—

CITY OF SHAKER HEIGHTS, *et al.*,

Appellee.

Date November 11, 1971

APPEAL FROM COMMON PLEAS COURT

No. 885,898

JOURNAL ENTRY

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

The first assignment of error is that the refusal of the City of Shaker Heights to accept paid political advertisements on the cars of its Shaker Heights Rapid Transit from the appellant constituted a denial of its freedom of speech and equal protection of the laws under the United States and Ohio Constitutions.

> "A municipality is not powerless to enact and enforce reasonable regulations . . . . It may enact ordinances prohibiting the attachment of political posters to public property and permitting recovery of the cost of removal of such posters." (*Peltz* v. *City of South Euclid,* 11 Ohio St. 2d 128)

Thus it is clear that the right to post political signs, particularly on public property, is not absolute, but rather is subject to reasonable regulation by the municipality.

In this case, the City of Shaker Heights has prohibited all political advertisements on the cars of its Shaker Rapid Transit Company. Such a prohibition as to public property is not a denial of the appellant's freedom of speech and, since it applies to all political advertisers, it is not a denial of equal protection of the laws.

The second assignment of error is without merit because this court is of the opinion that the judgment of the trial court in this case was correct, regardless of his reasoning, and affirms that judgment for the reasons stated in our conclusions as to assignment of error No. 1.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

COOK, *P.J.*, JONES, *J.* and HOFSTETTER, *J.*, concur.

ROBERT E. COOK
Presiding Judge

ROBERT E. COOK
(Cook, P. J., Jones, J. and Hofstetter, J. of the 11th Appellate District sitting by appointment in the 8th Appellate District)

N.B. This entry is made pursuant to the third sentence of Rule 22D, Ohio Rules of Appellate Procedure. This is an announcement of decision, (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

Journal Entry of the Trial Court

IN THE

COURT OF COMMON PLEAS

Case No. 885898

HARRY J. LEHMAN,

Plaintiff,

vs.

CITY OF SHAKER HEIGHTS, *et al.*,

Defendants.

STATE OF OHIO,
COUNTY OF CUYAHOGA, *ss.*:

This matter came on to be heard upon the complaint of plaintiff praying for a declaratory judgment and for an injunction, answers of the defendants, evidence presented to the court, and briefs of counsel.

This court, being duly advised in the premises, having considered the evidence and the law applicable thereto and on the authority of judgment of this court in Cuyahoga County Common Pleas Case No. 701922, affirmed by the Cuyahoga County Court of Appeals Case No. 24381, hereby declares that the constitutional rights of the plaintiff under the Constitutions of the State of Ohio and the United States have not been violated or infringed upon by the refusal of defendants to accept the political advertising of plaintiff on the Shaker Heights Rapid Transit.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that plaintiff's request for a temporary and permanent injunction against defendants is denied, plaintiff's petition is dismissed, and plaintiff is charged with the costs incurred herein.

PERCY J. JACKSON
Judge

Portion of the Contract Between the City of Shaker Heights and Metromedia, Inc.

THIS AGREEMENT, made and entered into as of the 1st day of August, 1970, by and between the City of Shaker Heights, a municipal corporation of the State of Ohio, party of the first part, hereinafter sometimes referred to as "SHAKER HEIGHTS," and Metromedia, Inc., (on behalf of its division, Metro Transit Advertising), doing business at Cleveland, Ohio, party of the second part, hereinafter sometimes referred to as the "CONTRACTOR,"

WITNESSETH, THAT:

WHEREAS, SHAKER HEIGHTS owns and is engaged in the operation of interurban electric railroad lines for transportation of passengers, hereinafter sometimes called the "TRANSIT LINES," in the Cities of Cleveland and Shaker Heights, Ohio, and the suburban area adjacent to Shaker Heights.

WHEREAS, the CONTRACTOR is engaged in the advertising business and principally in the placing of cards, signs, hangers and other forms of advertising for clients in or upon street cars and buses and other vehicles used in transportation of passengers, and in connection therewith, enters into contracts with its clients for the rendition of such advertising service and is in a position to render expert service to SHAKER HEIGHTS by creating revenue for it from advertising in its rail cars, buses and any other vehicles hereinafter called "CARS," used in its TRANSIT LINES.

NOW, THEREFORE, SHAKER HEIGHTS, in its capacity as owner and operator of said TRANSIT LINES, and the CONTRACTOR, each in consideration of the premises and the promises and agreements of the other herein set forth, have agreed and do hereby agree as follows:

* * * * *

15. * * * The CONTRACTOR shall not place political advertising in or upon any of the said CARS or in, upon or about any other additional and further space granted hereunder.

FILE COPY

OCT 23

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-328

HARRY J. LEHMAN,
Petitioner,

vs.

CITY OF SHAKER HEIGHTS and METROMEDIA, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-328

HARRY J. LEHMAN,
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vs.

CITY OF SHAKER HEIGHTS and METROMEDIA, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENTS IN OPPOSITION

The City of Shaker Heights and Metromedia, Inc., the respondents, submit this Brief in Opposition to Petition for a Writ of Certiorari pursuant to Rule 24 of the Rules of the Supreme Court of the United States.

PRELIMINARY ANALYSIS

The Petitioner presents the following two questions to the Court:

1. Whether the First Amendment precludes a municipality from refusing to sell political advertising when it sells all other forms of paid commercial and non-commercial advertising for display upon a transit system it owns and operates.

2. Whether a municipality, having opened a forum to some type of expression can discriminate against paid political advertisements in favor of paid commercial advertisements.

At the outset, Respondents answer by stating their position as follows:

> That a municipality may lawfully prohibit all political advertising in a municipally owned transit system while accepting paid commercial advertisements. That paid political advertising and paid commercial advertising are separate classifications of advertising and the permission for commercial advertising, only, does not work to deny the respondent any constitutional right to politically advertise for the office he was seeking.

The Petitioner argues two reasons for granting a writ, that the United States Supreme Court has never directly ruled upon any of the important questions involved in this case, and that the decision of the Ohio Supreme Court is in direct conflict with a score of recent decisions of the United States Supreme Court and other courts that once a state opens a forum for speech, the forum must be held open to all speakers.

In response, it should be pointed out that in *Columbia Broadcasting Systems, Inc. v. Democratic National Committee*, 93 S. Ct. 2080 (1973), a case cited by the Petitioner, this Court held that:

> Neither the Communications Act nor the First Amendment requires broadcasters to accept paid editorial advertisements.

But, while *Columbia Broadcasting* suggests that broadcasters need not accept all forms of advertising, nothing therein suggests that a municipally owned transit system, having accepted commercial advertisments, is some-

how pressed by constitutional mandate to accept a paid political advertisement for a candidate running for office.

STATEMENT OF FACTS

This action was brought in the Common Pleas Court of Cuyahoga County by plaintiff-petitioner, Harry J. Lehman, against defendants-respondents, City of Shaker Heights, Mayor Paul K. Jones of Shaker Heights, and Metromedia, Inc., seeking the following relief:

1. That the court restrain the defendants-respondents from refusing to accept plaintiff-petitioner's proffered political advertisements for display on Shaker Heights Rapid Transit cars.

2. That the court declare that the policy of the defendant-respondent City of Shaker Heights infringed upon rights guaranteed to plaintiff-petitioner by the First and Fourteenth Amendments of the United States Constitution and Article I, Section 11, of the Ohio Constitution.

The evidence adduced at the trial in Common Pleas Court showed that for over twenty-five years, since the Shaker Heights Rapid Transit System became municipally owned and operated, the consistent policy and practice of the City of Shaker Heights has been not to permit the use of Rapid Transit property for political or public issue advertising of any sort. The policy has been all-inclusive and non-discriminating, so that not even issues or candidates of the City itself or other public agencies are advertised in this manner.

The reasons and purpose for the adoption and enforcement of this policy by the City officials are obvious. The

City officials have determined that it is in the best interest of the City not to open up Rapid Transit vehicles to any political or other First Amendment types of communication, in order to avoid any possibility, appearance, or suspicion of political favoritism, unequal protection of the law, or discrimination.

The Court of Common Pleas for Cuyahoga County denied plaintiff-petitioner's request for a temporary and permanent injunction and declared that his rights under the Constitutions of the State of Ohio and the United States had not been violated or infringed upon by the City's determination to adhere to its long-standing, non-discriminatory policy of not accepting political advertising for display in Rapid Transit cars.

Plaintiff-petitioner appealed the judgment of the Common Pleas Court to the Eighth Judicial District Court of Appeals which held that the policy of the City of Shaker Heights is a reasonable regulation of the right to post political signs and as such denies appellant neither freedom of speech nor equal protection of the law.

The Ohio Supreme Court affirmed and held in its syllabus:

> Where a municipality has approved the acceptance of commercial advertisements for display in its owned and operated rapid transit vehicles and refuses to accept any political advertisements urging the candidacy of an aspirant to political office, such refusal is not a violation of the candidate's rights of free speech and equal protection under the First and Fourteenth Amendments to the United States Constitution and Section 11 of Article I of the Ohio Constitution.

The Supreme Court of Ohio in its holding found:

> The proponents are confusing free speech forums with the marketplace. Purveyors of goods and serv-

> ices saleable in commerce may purchase advertising space on an equal basis, whether they be house builders or butchers. They are coursing in the stream of commerce. But the Rapid Transit System has determined that political advertising is not acceptable as a matter of long-time policy because of the "chances for abuse, the possibility of discrimination or favoritism, and the risk of violating the passengers' rights." There is no distinction as to candidates. As a class, they are excluded from using the rapid transit vehicles for their political advertising.

The Ohio Supreme Court relied on *Packer Corp. v. Utah* (1932), 285 U.S. 105, 110, that street car advertising is a special class of advertising. Justice Brandeis wrote the opinion which approved the Utah Supreme Court opinion.

> * * * Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard. These distinctions clearly place this kind of advertisement in a position so that regulations or prohibitions may be imposed upon all within the class * * *

The Supreme Court of Ohio in its opinion further said:

> Manifestly, there is no denial of equal protection of the laws, as claimed by plaintiff, because everybody in his class as a candidate for public office is treated identically, and his political advertising is not accepted because of policy. Shaker Heights sets plaintiff's class

apart from house builders, butchers and other business entrepreneurs who regularly patronize the commercial advertising market and who are the commercial customers of the Shaker Heights Rapid Transit System advertising plan.

ARGUMENT

A long-standing policy of a municipality in accepting only commercial advertising for display in Rapid Transit vehicles is a reasonable, non-arbitrary, and constitutionally permissible regulation of a governmentally owned and operated transit system.

The Supreme Court of Ohio has made it clear that the right to erect or place political signs is not absolute but is subject to reasonable regulation by a municipality. In *Peltz v. City of South Euclid*, 11 Ohio St. 2d 128 (1967), the Ohio Supreme Court declared unconstitutional a broad regulation which prohibited the display of all political signs within the boundaries of the City of South Euclid. In reaching this holding, the Court stated:

> A municipality is not powerless to enact and enforce reasonable regulations . . . *It may enact ordinances prohibiting the attachment of political posters to public property and permitting recovery of the cost of removal of such posters.* 11 Ohio St. 2d at 133. (Emphasis added.)

Peltz, therefore, unequivocally illustrates that the right to post political signs is not absolute, but rather is subject to reasonable regulation by the municipality. See also *Brayton v. City of Anchorage*, 386 P.2d 832 (S. Ct. Alaska 1963).

The limitation upon political advertising in the instant case is considerably more limited in scope than the prohibition which was questioned in *Peltz*. The City of Shaker

Heights has not enacted an absolute prohibition of all political signs within its borders. It only refuses political advertisement on and within a particular and limited area of public property, that is, on and within Rapid Transit cars. Thus, there is no absolute prohibition of political signs within the municipality, but merely a reasonable policy limiting the attachment of political posters to certain public property. The area of limitation is not oppressive because the policy applies only to the city-owned and operated Rapid Transit cars and does not affect political advertising in any of the usual communications media within the City.

It is further submitted that the policy or rule of the City of Shaker Heights which would be violated by the acceptance of Petitioner's advertising is a reasonable, purposeful and appropriate policy. It is a policy which has been adhered to without deviation and without discrimination and is based on a reasonable, non-arbitrary classification. It has been uniformly adhered to for over 27 years and during that time has been challenged but once prior to the institution of this lawsuit.

Political advertisements in the cars of the Shaker Heights Rapid Transit, which is owned and operated by the City of Shaker Heights, would suggest, on the one hand, that some political favoritism is being granted to the candidate so advertised, or, on the other hand, that the candidate so advertised is being supported or promoted by the government of the City. The City itself should not, and does not, use public funds or public property for the advancement or promotion of any public candidate or political issue. It follows, therefore, that the City should not lend public facilities to the same end.

The mere acceptance of commercial advertisements for display in publicly owned and operated rapid transit vehicles does not transform these v e h i c l e s into "forums," such as newspapers, magazines, radio, and television, in which the unrestricted expression of all forms of ideas must be constitutionally allowed.

A long line of decisions has also established the rule that commercial messages do not come within the ambit of First Amendment protection. (See *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1119). Appellant has recognized, in the present case, that there would be no constitutional question involved and no deprivation of his rights of freedom of speech under the First Amendment to the United States Constitution or Article I, Section 11, of the Ohio Constitution, if the City did not permit *any* advertising in or upon its Rapid Transit vehicles. That is, there is no absolute or protected right to place advertising material or political advertising on City transit cars which is comparable to the constitutionally protected right of free speech with respect to oral pronouncements or the distribution of literature on the public streets.

Contrary to the Shaker Heights ordinance and the contract with Metromedia, Inc. which provides for an absolute prohibition against political advertising in any form, the cases cited by appellant involve discriminatory or vague local policy, such as that discussed in *Wirta v. Alameda Contra Costa Transit District*, 64 Cal. Rptr. 430, 434 P.2d 982 (1967). In addition to commercial advertising, the transit board in the *Wirta* case accepted *some* political advertising, to wit: "in connection with and at the time of a duly called election" being held within the boundaries of the transit district. Thus, the case involved a discriminatory practice and did not involve "absolute exclusion of all political advertising" as suggested by ap-

pellant. Nevertheless, the court in the *Wirta* case was narrowly split, four justices to three, and in a vigorous dissent three members of the court said that the majority's assumption that the transit district had opened up a "forum" for the expression of ideas was incorrect. The dissenters agreed that the transit board may not "pick and choose between ideas advanced." In the present case there is even less basis than there was in the *Wirta* case for assuming that a "forum" for the expression of ideas has been opened up, and the City of Shaker Heights certainly has not been guilty of "picking and choosing between ideas" by merely separating commercial from political advertisements.

In reply to some of petitioner's citations, it is submitted:

The case of *Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 171 P.2d 885 (1946), is distinguishable. In that case the San Diego Civil Liberties Committee brought up the issue of the availability of public school buildings for public meetings. The use of the building was contingent upon the Civil Liberties Committee taking a loyalty oath.

In *Kissinger v. New York City Transit Authority*, 274 F. Supp. 438 (S.D. N.Y., 1967), the facts are again distinguishable. In an attempt to place anti-Vietnam war literature in transit cars, the Students for a Democratic Society were challenging the New York Transit Authority's contract rights with the New York Subways Advertising Company which allowed the Transit Authority to reject an "objectionable" advertisement; again, a vague, standardless policy. The instant case does not involve such a vague standard. It is distinguishable because it involves an absolute prohibition of political advertisement within a limited area of public property.

Zucker v. Panitz, 299 F. Supp. 102 (S.D. N.Y., 1969), concerned the right of high school students to publish a paid advertisement opposing the war in Vietnam in their school newspaper. It should be pointed out that a school newspaper is a forum for dissemination and *exchange* of ideas, and that the essence of First Amendment protection is extended to that very dissemination and exchange of ideas. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Shaker Rapid Transit cars are not a forum in the same sense that a student newspaper is a forum; there can be no possibility of the exchange and interplay of ideas in the so-called forum created by advertising whose message travels in one direction only and falls upon subjects who must remain mute. See *Packer Corporation v. State of Utah*, 285 U.S. 105, 110 (1932).

Similarly, *Lee v. Board of Regents of State Colleges*, 306 F. Supp. 1097 (W.D. Wis. 1969), involved a campus newspaper's acceptance of commercial advertisements and of those public service advertisements that did not attack an institution, group, person or product. The court held that this was an impermissible form of censorship. In the instant case, Shaker Rapid Transit cars do not constitute a "forum" as did this campus newspaper. No judgment or determination is required of Shaker Heights officials as to whether an advertisement is negative or positive. In the present case the "one-way" message of the political advertising in question does not lend itself to the *exchange* of ideas so favored by the First Amendment, and is akin to propaganda which bears down upon a captive audience.

In the *Wirta* case *supra* the court made an *a fortiori* assumption that permitting the display of commercial advertising has the effect of opening a limitless forum. Judge Finley, in his concurring opinion in *Hillside Community Church, Inc. v. City of Tacoma*, did not challenge the majority's conclusion that a forum existed in that case.

However, he felt it necessary to indicate, as set forth below, that the *Wirta* argument for the presence of a forum was unconvincing:

> The a fortiori form assumes that the interests involved in commercial expression and First Amendment speech are the same, and hence that to allow the former means the latter must be allowed. But the transit system may have allowed the former because the messages which it conveys *are* unimportant, *do not reach* fundamental values, *and do not deeply arouse* emotional responses. It may be tolerable precisely because it is trivial. 455 P.2d at 356.

Justice Black, in his concurring opinion in *Public Utilities Commission v. Pollack*, 343 U.S. 451 (1952), stated:

> . . . . Capital Transit's musical programs (which also included commercial messages) have not violated the First Amendment. I am of the opinion, however, that subjecting Capital Transit's passengers to the broadcasting of news, public speeches, views, or propaganda of any kind and by any means would violate the First Amendment. 343 U.S. at 366.

Thus, Justice Black recognized that there is a definite distinction between subjecting a captive audience to commerical messages, on the one hand, and political messages, on the other.

It has been held by the United States Supreme Court in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969), that the public has a First Amendment interest in the mode, manner, and content of public debate aired on the broadcast media. Petitioner advocates that principles applicable to the communications media, which have been recognized to be affected with strong First Amendment interests, be extended to display advertising in rapid transit cars. However, rapid transit cars have long been recognized by the United States Supreme Court as an advertis-

ing medium that is to be distinguished from other advertising media. Petitioner totally ignores Justice Brandeis' opinion in *Packer Corporation v. State of Utah, supra,* which held that street car advertising is a special class of advertising.

Thus, contrary to the Petitioner's contention, the decisions in the free speech area may not be applied across the board to the Rapid Transit situation since there is a fundamental difference between, on the one hand, transit cars and, on the other, communications media such as newspapers, magazines, radio, and television, the primary purpose of which is to serve as a forum for the exchange and interplay of ideas.

Next, it must be pointed out that *Valentine v. Chrestensen,* 316 U.S. 52 (1942), said that the control of commercial advertising is entirely within the scope of local government. Absent a specific holding by this Court on this topic, it would appear not only that a local government may regulate what type of commercial advertising it takes, but that it is within a city's power to take *only* commercial advertising, and thus prevent the possible opening of a forum for any and all types of expression.

In *Valentine* there was an ordinance prohibiting dissemination of handbills and circulars. The distinguishing feature of this ordinance was its application only to *commercial* advertising matter. The defendant had prepared handbills advertising his business. The police advised him that only handbills on public issues would be lawful. Defendant then attempted to sidestep the ordinance by printing his advertisement on one side and a protest against the police on the other side. The Court said that this was still advertising and that in the distribution of commercial advertising, the judgment of the legislature concerning the

appropriate accommodation of interests is final. 316 U.S. at 54. The Court noted that:

> The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems *an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated.* 316 U.S. at 54-55. (Emphasis added.)

In the instant case, the Council of the City of Shaker Heights by prohibiting political advertisement is within the *Valentine* principle in exercising its control over commercial advertising by allowing *only* commercial advertising, thus drawing a clear dividing line between commercial and political advertising.

CONCLUSION

The courts below correctly found that plaintiff-petitioner's constitutional rights were not violated by the long-standing policy of the City of Shaker Heights.

The evidence in the case and plaintiff-petitioner's legal argument do not disclose any wrongful discrimination on the part of the City. No deprivation of rights protected by the First and Fourteenth Amendments to the United States Constitution (or Article I, Section 11, of the Constitution of the State of Ohio) has occurred, because no forum for the unrestricted expression of all forms of ideas has been created or established. The City has not opened up its transit cars to any exchange or presentation of ideas, political or otherwise. The sale of space for commercial advertising does not create such a forum or confer First Amendment rights. No court has so held.

The Petition should be denied.

Respectfully submitted,

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FILE COPY

DEC 26

MICHAEL RODAK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-328

HARRY J. LEHMAN,

Petitioner,

—v.—

CITY OF SHAKER HEIGHTS and METROMEDIA, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-328

HARRY J. LEHMAN,

Petitioner,

—v.—

CITY OF SHAKER HEIGHTS and METROMEDIA, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF PETITIONER

Opinions Below

The opinion of the Supreme Court of Ohio is reported at 34 Ohio St. 2d 143 and at 296 N.E.2d 683. It is set forth in the Appendix to the petition for a writ of certiorari (which is attached to the printed petition) at pp. 1a-16a.* The Journal Entry of the Court of Appeals for Cuyahoga County, Ohio, is set forth in the appendix at pp. 19a-21a. The Journal Entry of the trial court is set forth in the appendix at pp. 22a-23a.

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* References in this brief to the Appendix attached to the petition for a writ of certiorari will hereafter be cited as "__a". References to the separate Appendix will be designated as "__A".

Jurisdiction

The judgment of the Supreme Court of Ohio was entered on May 23, 1973. The petition for a writ of certiorari was filed on August 21, 1973, and it was granted on November 12, 1973. This Court has jurisdiction to review the judgment of the Supreme Court of Ohio by writ of certiorari pursuant to Title 28, United States Code §1257(3).

Question Presented

Whether the First and Fourteenth Amendments prevent a municipality from refusing to sell political advertising for display upon transit vehicles it owns and operates when it has opened a forum by accepting and displaying all other forms of paid commercial and non-commercial advertising.

Constitutional Provisions Involved

1. United States Constitution, Amendment I:

   Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. United States Constitution, Amendment XIV, Section 1:

   All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Petitioner, plaintiff below,[1] a resident of Shaker Heights, Ohio, was, in mid-1970, a candidate for the office of State Representative to the Ohio General Assembly for the 56th District.[2] As one of the means of promoting his candidacy he sought to purchase advertising space on the Shaker Heights Rapid Transit because "the vast majority of its six to eight thousand riders each day are residents of the district . . . ." Appendix at 14A.

He attempted to purchase the advertising space for the three months prior to the election,[3] by contacting an em-

[1] Hereinafter the parties will be referred to according to their designation in the trial court.

[2] Petitioner was elected to the Ohio House of Representatives and next faces election in 1974. He therefore still has a valid interest in seeking the right to purchase political advertising on the Shaker Heights Transit System. *See, e.g., Jeanette Rankin Brigade* v. *Chief of the Capitol Police*, 421 F.2d 1090, 1092-93 (D.C. Cir. 1969), *on remand*, 342 F. Supp. 575, 579-81 (D.D.C. 1972), *aff'd*, 409 U.S. 972 (1972). As a result, this controversy is not moot in any legal sense. On the contrary, he has a live and continuing stake in the outcome despite the passage of the particular election since it is necessary to settle a practice which is still in force. *Compare Dunn* v. *Blumstein*, 405 U.S. 330, and esp. 333 n. 2 (1972), *with Hall* v. *Beals*, 396 U.S. 45 (1969). Indeed, even voluntary termination of the policy would not create a moot controversy here. *See, e.g., Carroll* v. *Princess Anne*, 393 U.S. 175 (1968); *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965); *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953); *Lankford* v. *Gelston*, 364 F.2d 197 (4th Cir. 1966).

[3] Appendix at 14A.

ployee of Metro Transit Division of defendant Metromedia, Inc., the exclusive advertising agent for the Shaker Heights Transit System.[4] The employee instructed plaintiff to present the proposed art work to Metromedia for approval as required by Metromedia's "Metro Transit Advertising Copy Policy." Appendix at 16A. Pursuant to the guidelines set forth in the policy, plaintiff's advertising agency submitted the copy for approval. The complete text of the proposed poster read as follows:

> "Harry J. Lehman Is Old Fashioned
> "About Honesty, Integrity, And Good Government
> "State Representative, District 56"

Appendix at 39A. After reviewing the copy, Metromedia's local sales manager, Mr. Hibbs, initialed it to signify that the advertisement met the standards set by the company.[5] Appendix at 16A-17A, 27A.

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[4] Appendix at 24A. The system is city owned and operated and, therefore, its actions, performed under state authority, constitute state action within the meaning of the Fourteenth Amendment. It is too late in the history of the First Amendment to even suggest that the amendment does not apply to actions of a municipality. *E.g., Staub* v. *City of Baxley*, 355 U.S. 313, 321 (1958); *Lovell* v. *City of Griffin*, 303 U.S. 444, 450 (1938); *see, e.g., Grosjean* v. *American Press Co., Inc.*, 297 U.S. 233, 244 (1936); *Gitlow* v. *New York*, 268 U.S. 652, 666 (1925).

[5] The proposed advertisement, identified at 16A and received into evidence at 28A, was photo-reduced for inclusion in the appendix and appears at page 39A. The "Metro Transit Advertising Copy Policy" was included by Justice Stern in his dissent to the opinion of the Supreme Court of Ohio and is reproduced in the appendix to the petition for a writ of certiorari at 13a n. 4. The standards set by the company for political advertising may be found at paragraph "(2)" of the "Copy Policy". *Id.* The policy states that "Metromedia Advertising will not accept any political copy that pictorially, graphically or otherwise states or suggests that proponents or opponents of the persons or measures advertised are vulgar, greedy, immoral, monopolistic, illegal or unfair."

Thereafter, the employee, who admitted that the requested space was available,[6] refused to lease the plaintiff any of the twenty (20) advertising spaces available within each of the transit system's fifty-five (55) cars. Appendix at 15A.

The employee refused to rent plaintiff the space required because of Metromedia's contract with the City of Shaker Heights which forbids Metromedia from placing "political advertising in or upon any of said cars" owned by the transit system.[7] Although Metromedia's contract with Shaker Heights prevents it from accepting "political advertisements," [8] it is free to and does accept advertisements for cigarettes, liquor, banks, savings and loans, and retail goods and services. In addition to these commercial advertisements, defendants also accept civic, charitable and public service advertisements from churches and other institutions like the Girl Scouts, Boy Scouts, Peace Corps and the Police Athletic League. Appendix at 25A-26A.

The city has stated that the reasons for its policy of not accepting paid political advertisements are: the administrative problem of providing equal space;[9] the "chances for

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[6] Appendix 14A, 25A.

[7] The applicable parts of the contract appear in the appendix to the petition for a writ of certiorari at 24a-25a. It was introduced and admitted into evidence as a joint exhibit at pages 15-16 of the transcript.

[8] In this case, the city admits that the prohibition against political advertising was placed in the contract at its insistence. Appendix at 32A. In any event, even if the policy had been instituted by Metromedia, it would still be sufficient state action to maintain this inquiry. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438, 441 (S.D.N.Y. 1967).

[9] See Plaintiff's Exhibit 2.

abuse"; and the possibility of "discrimination" or "favoritism." [10]

After attempting to get the city to change its policy without success, plaintiff filed a complaint with the Court of Common Pleas for Cuyahoga County, Ohio, seeking an injunction and a declaratory judgment declaring defendants' policy to be a violation of his constitutional rights under the First and Fourteenth Amendments to the United State Constitution and under the Ohio Constitution. The trial court denied the request for the declaratory judgment and for a permanent injunction. The Eighth District Court of Appeals and, thereafter, the Supreme Court of Ohio, in a four to three decision, affirmed the trial court.

The federal questions tendered herein were presented to the trial court by the complaint and a memorandum of law. The trial court passed on the questions in its journal entry. See appendix to petition for writ of certiorari at 22a-23a. Thereafter, the issues were raised in the Court of Appeals and the Supreme Court of Ohio by plaintiff's statements, briefs and arguments.

The Supreme Court of Ohio passed on the federal questions in its opinion, holding:

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[10] Appendix at 31A. Additionally, the defendants have argued that allowing political advertising would be a violation of their passenger's privacy rights, *see, e.g.*, Brief of Respondents in Opposition (to petition for writ of certiorari) at 10-11, and the Supreme Court of Ohio readily accepted this argument. Appendix to petition for a writ of certiorari at 5a. However, it seems that this rationale is the invention of counsel rather than a matter of record. The sole testimony as to the reasons for the policy was given by the Mayor of Shaker Heights, Paul K. Jones, and he stated only the reasons given in the text accompanying this footnote.

> Where a municipality has approved the acceptance of commercial advertisements for display in its owned and operated rapid transit vehicles and refuses to accept any political advertisements, urging the candidacy of an aspirant to political office, such refusal is not a violation of the candidate's rights of free speech and equal protection under the First and Fourteenth Amendments to the United States Constitution. . . .

Appendix to petition for a writ of certiorari at 1a.

Justice Stern, joined by Chief Justice O'Neill and Justice W. Brown, dissented from the majority opinion in all respects. Appendix to petition for a writ of certiorari at 7a-16a.

The Ohio Supreme Court's Opinion

The Ohio Supreme Court, relying on this Court's decision in *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942), ruled that commercial advertising is not within the ambit of the First Amendment's protection. Having determined that commercial advertising was not protected speech, the court concluded that the establishment of a commercial advertisement program on these rapid transit vehicles did not open a forum for free speech. Based on this theory, the court held "that a local government may regulate the type of commercial advertising it accepts, and that it is within the authority of that local government to accept only commercial advertising. . . ." Appendix to petition for a writ of certiorari at 7a.

Summary of Argument

In this case the Supreme Court of Ohio reversed traditional First Amendment values and placed a premium on commercial speech over political speech. This result is particularly obnoxious in a democracy because political advertising is at the center of the First Amendment. Most of all, the First Amendment protects speech concerning public affairs and prevents the state from interfering with public discussions of public questions. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 269 (1964).

Moreover, in arriving at its decision, the court below elected to disregard established principles of law that have been developed to prevent the kind of selective exclusion from a public forum that occurred in this case. There are a wealth of cases, some directly in point, that should have governed the ruling below. In particular, this case should have been controlled by *Police Department of the City of Chicago* v. *Mosley,* 408 U.S. 92 (1972), and the decisions which support it, and *Wirta* v. *Alameda-Contra Costa Transit District,* 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967). In the *Mosley* case this Court applied the "public forum" doctrine in ruling that an ordinance which allowed labor picketing near schools but prohibited all other types of picketing was unconstitutional under both the First and Fourteenth Amendments. In *Wirta,* the California Supreme Court applied the public forum doctrine to a case which is almost identical to this one. There, a group of persons wished to place an anti-war advertisement on transit vehicles that allowed only commercial advertising. The court ruled, consistent with the public forum doctrine, that by having dedicated its buses for use

by advertisers, the system could not exclude from the forum views that it could not countenance.

Nor did the court below examine the reasons which the city relied upon to support its exclusionary policy. Had it done so, as the dissent did, it would have discovered that the excuses for the policy were insufficient to justify a policy which attacks an activity of "governing importance."

ARGUMENT

Introduction

At the outset, it is helpful to understand this case in its relation to the nature of the First Amendment. While theory will not furnish a mechanical basis for this Court's decision, it will provide a reasoned appraisal of whether the restriction on political advertising is compatible with the First Amendment.

Although a number of theories[11] have been advanced to explain the "central meaning of the First Amendment," *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 273 (1964), this Court has increasingly in recent years pronounced the purpose of the amendment in terms of what has become known as the "self-government" theory.[12] The theory, which

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[11] For short, accurate synopses of the relevant theories now in vogue, *see* DuVal, *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161, 188-203 (1972), and Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879-86 (1963).

[12] The historically most important of the theories on the meaning of the First Amendment is the "market place theory". This theory suggests that the core value of the amendment is in protecting the search for truth, *i.e.*, truth will be discovered when ideas are free to compete for acceptance in the market place. *See, e.g.*, *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940).

came to the fore in this Court's decision in *New York Times Co.* v. *Sullivan*,[13] is based on the view that speech concerning public affairs is the essence of self-government.[14] *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). The First Amendment assures the American people of the right to obtain the necessary knowledge to govern themselves, *see, e.g., Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, 395 U.S. 367, 390 (1969); *Time, Inc.* v. *Hill*, 385 U.S. 374, 388-89 (1967); *Cox* v. *Louisiana*, 379 U.S. 536, 552 (1965), and "the right of individuals . . . to attempt to persuade others to their points of view." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 193 (1973) (Brennan, J., dissenting) (hereinafter cited as *CBS*). Authoritative interpretations of the First Amendment have consistently recognized "that debate on public issues should be uninhibited, robust and wide-open," 376 U.S. at 270, if we are to maintain a government that is responsive to the will of the people. *Stromberg* v. *California*, 283 U.S. 359, 369 (1931). The self-government

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[13] For an excellent critique of the *Times* case and its effect on First Amendment theory, see Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191.

[14] The self-government theory has not replaced the market place theory as an analytical tool in construing the First Amendment. Rather, the two theories are now generally used in tandem. *See, e.g., Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, 395 U.S. 367, 390 (1969). Nor would have Professor Meiklejohn, the leading advocate of the self-government theory, objected to the joinder of the two theories for he too saw self-government best preserved through competition of ideas in the market place. Meiklejohn, POLITICAL FREEDOM 73 (1960).

Although the self-government theory arose to prominence with the *Times* case, the thesis did appear every now and then in some of this Court's pre-Meiklejohn opinions. DuVal, *Free Communication of Ideas, supra* note 11, at 194 n. 138.

theory is based on the thesis that the First Amendment protects these principles.

The First Amendment, then, is the repository of the power of self-government and, because of the amendment, the governors may not infringe on any discussion or debate on public issues held by those governed.[15] The First Amendment is an absolute when the speech is concerned with the spreading of information and opinion necessary for citizens to make electoral decisions. While this Court has held that some kinds of speech and writings, such as "obscenity" and "fighting words" are not expression within the protection of the First Amendment, the *Times* case stands firmly for the proposition that "freedom to discuss public affairs and public officials is unquestionably . . . the kind of speech the First Amendment was primarily designed to keep within the area of free discussion." 376 U.S. at 296-97 (Black, J., concurring). Particularly within the unqualified protection of the amendment are the "vast range of forms of thought and expression by which the voter might equip himself to exercise a proper judgment in casting his ballot." Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment,* 79 HARV. L. REV. 1, 13 (1965).[16] The state is powerless to abridge the freedom of

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[15] The *New York Times* Court emphasized the importance of the First Amendment in helping to maintain a government of the governed. 376 U.S. at 269. It is precisely because of this vital interest to be protected by the First Amendment that this Court has elevated the freedoms of speech and press to a "preferred position." *E.g., Saia* v. *New York,* 334 U.S. 558, 562 (1948); *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945).

[16] The placards here are absolutely within the protection of the First Amendment since they are an accepted technique of seeking popular support. *Cf., Martin* v. *City of Struthers,* 319 U.S. 141, 146 (1943). Also, the fact that the message is proposed as a paid advertisement does not make a constitutional difference. *New York Times Co.* v. *Sullivan, supra.*

electoral power of the people. Meiklejohn, *The First Amendment Is an Absolute,* 1961 SUP. CT. REV. 245, 254. *See generally* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment, supra;* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L. REV. 877 (1963).

Thus, the action of defendants in denying plaintiff the opportunity to lease advertising space for political speech, viewed in light of the central meaning of the First Amendment, should not be tolerated. We are dealing here with one of the classic examples of an activity which is of "governing importance." Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment, supra* at 13. In this case, by banning political advertising while allowing all other types of commercial and noncommercial advertisements, the city of Shaker Heights is interfering solely with "[p]ublic discussion about the qualifications of a candidate for electoral office." It is undoubtedly the strongest possible case for judicial intervention. *Ocala Star-Banner Co.* v. *Damron,* 401 U.S. 295, 300 (1971).

Political advertisements are one of the principle means by which self-governing men equip themselves to perform their electoral function and one, we might reemphasize, which is inherently at the root of the First Amendment. *Business Executives' Move for Vietnam Peace* v. *F.C.C.,* 450 F.2d 642, 659 (D.C. Cir. 1971) (hereinafter cited as *Business Executives*), *rev'd sub nom. Columbia Broadcasting Systems, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1973). The present advertisement, as political expression on a public issue, clearly qualifies for constitu-

tional protection. *New York Times Co.* v. *Sullivan,* 376 U.S. at 271. "It is the right of the public to receive suitable access to . . . political . . . ideas and experiences which is crucial" in this case and begs for protection. *Red Lion Broadcasting Co., Inc.* v. *F.C.C.,* 395 U.S. at 390 (1969).

As will be shown below, the public-forum doctrine, recently articulated by the Court in *Police Department of the City of Chicago* v. *Mosley,* 408 U.S. 92, 96 (1972),[17] prevents the perverse type of discrimination practiced by the city owned and operated transit system against expressions of governing importance.

By Dedicating Its Transit System's Vehicles for Use as a Forum for Commercial and Public Service Advertisements, the City Opened a Forum for All Speech and It Cannot Close the Forum to Ideas With Which It Does Not Wish to Contend.

The majority of the Ohio Supreme Court erred because it failed to comprehend that the public forum right is a guarantee of *nondiscriminatory*[18] access to publicly owned

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[17] Hereinafter cited as *Mosley.*

[18] The protection against nondiscriminatory access is supported by two separate, but closely intertwined amendments to the Constitution. *See, e.g., Police Department of the City of Chicago* v. *Mosley,* 408 U.S. at 95-96. Whether embodied within the Fourteenth Amendment's equal protection clause or the equal protection principles developing within the First Amendment, *see* 408 U.S. at 95 and n. 3; *Williams* v. *Rhodes,* 393 U.S. 23, 30-31 (1968); Blasi, *Prior Restraints on Demonstrations,* 68 MICH. L. REV. 1481, 1492 n. 41 (1970), the guarantee of nondiscriminatory access prevents the state from picking and choosing among different views on the basis of the views expressed. Furthermore, whether the guarantee is supported by the First or Fourteenth Amendment is academic to a determination of this appeal since, in either case, the crucial question is whether there is a substantial government justi-

or controlled areas of communication, regardless of the primary purpose for which the area is dedicated. *E.g.*, *Cox* v. *Louisiana*, 379 U.S. 536, 557-58 (1965) and 578-81 (Black, J., concurring in part); *Marsh* v. *Alabama*, 326 U.S. 501, 505 n. 2 (1946). Indeed, the error was compounded because we were dealing with a forum that showered its favoritism on all advertisements except those that expressed political ideas. Such favoritism flies in the face of the First Amendment, whose central purpose, as we have seen, is to protect the ability of individuals to gain the knowledge necessary to govern themselves.

The evolution of the concept that the state cannot selectively exclude speakers from an area of communication or, as it is now called, a public forum, began with the cases of *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938), and *Hague* v. *C.I.O.*, 307 U.S. 496 (1939).[19] *See generally* Gardner, *Free Speech in Public Places*, 36 B.U.L. Rev. 239, 241-48 (1956); Horning, *The First Amendment Right to a Public Forum*, 1969 Duke L. J. 931, 932-37.

The former case involved the conviction, which this Court overturned, of a defendant for distributing religious tracts

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fication for the city's discrimination among types of advertising, 408 U.S. at 98-99, and the rational classification argument is not germane. *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 439 (1963); *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 639 (1943); *Business Executives*, 450 F.2d at 660; *Wirta* v. *Alameda-Contra Costa Transit District*, 68 Cal.2d 51, 59-60, 434 P.2d 982, 988, 64 Cal. Rptr. 430, 436 (1967).

[19] *Hague* implicitly overruled *Davis* v. *Massachusetts*, 167 U.S. 43 (1897), a case that denied the existence of any public forum. *See Jamison* v. *Texas*, 318 U.S. 413, 415-16 (1943).

in the streets of Griffin, Georgia without having first obtained written permission from the city manager as required by a city ordinance. In the latter case, this Court affirmed an injunction granted against the mayor of Jersey City who attempted to limit the activities of union organizers by denying them permits to use public parks and streets for speeches and leaflet distribution.

The legal principles derived from these two cases and their progeny[20] are clear:

> [G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusion from a public forum may not be based on content alone, and may not be justified by reference to content alone.

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[20] *E.g.*, *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972); *Police Department of the City of Chicago* v. *Mosley*, 408 U.S. 92 (1972); *Brown* v. *Louisiana*, 383 U.S. 131 (1966); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Staub* v. *City of Baxley*, 355 U.S. 313 (1958); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Jamison* v. *Texas*, 318 U.S. 413 (1943); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Carlson* v. *California*, 310 U.S. 106 (1940); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Schneider* v. *State*, 308 U.S. 147 (1939).

Mosley, 408 U.S. at 96 (footnote omitted). *See generally* Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L. J. 931; Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

Furthermore, the Court's recent refusal in *CBS* to apply the public forum doctrine to the broadcasting industry does not affect the principles recognized in *Mosley*. Rather, *CBS* demonstrates the public forum doctrine's continued viability and evidences the Court's willingness to apply it in appropriate cases. Mr. Chief Justice Burger, writing for the majority, noted with approval the "decisions holding that state-supported school newspapers and public transit companies were prohibited by the First Amendment from excluding controversial editorial advertisements in favor of commercial advertisements,"[21] but

[21] It should be noted in this regard that the Court cites the cases that have applied the public forum doctrine to public transit companies in circumstances quite similar to those presented by this case. 412 U.S. at 129 n. 23. The transit company cases cited are: *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967); *Hillside Community Church, Inc.* v. *City of Tacoma*, 76 Wash.2d 63, 455 P.2d 350 (1969); *Wirta* v. *Alameda-Contra Costa Transit District*, 68 Cal.2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967). *Kissinger* is closely analogous to the case at bar, while both *Wirta* and *Hillside Community Church, Inc.* applied the public forum doctrine to fact patterns almost identical to those here.

For similar cases involving speech in public forums, *see, e.g.*, *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Bazaar* v. *Fortune*, 476 F.2d 570, *aff'd on rehearing en banc*, No. 72-2175 (5th Cir. December 6, 1973); *Joyner* v. *Whiting*, 477 F.2d 456 (4th Cir. 1973); *Wolin* v. *Port of New York Authority*, 392 F.2d 83 (2nd Cir. 1967), *cert. denied*, 393 U.S. 940 (1969); *Lee* v. *Board of Regents of State Colleges*, 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971); *Trujillo* v. *Love*, 322 F. Supp. 1266 (D. Colo. 1971); *Radical Lawyers Caucus* v. *Pool*, 324 F. Supp. 268 (W.D. Tex. 1970); *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969); *Danskin* v. *San Diego Unified School District*, 28 Cal.2d 536, 171 P.2d 885 (1946); *People* v. *St. Clair*, 56 Misc.2d 326, 288 N.Y.S.2d 388 (Crim. Ct. 1968).

determined that, because of the unique circumstances inherent within the broadcasting industry, those cases were not applicable to the issues before the Court. It seems patent that had the Court not found these unique circumstances within the broadcasting industry and a lack of state action, the majority would have applied the public forum doctrine. It is submitted that the only difference in the position of the majority and the dissenters is at the threshold question of whether the doctrine applies to the particular facts in *CBS* and not whether the doctrine still exists or even whether the First Amendment prohibits the exclusion of editorial advertisements in favor of commercial advertisements. 412 U.S. at 128-30.

This is not to say, however, that the state cannot preserve the utility of the forum to the service for which it has been dedicated through the use of reasonable "time, place and manner" regulations. *CBS*, 412 U.S. at 200 (Brennan, J., dissenting); *Hague* v. *C.I.O.*, 307 U.S. at 515-16.[22] Yet, although there may be legitimate governmental reasons for having regulations,[23] the state cannot in the guise of regulation discriminate among particular speech on the basis of its content,[24] its controversiality,[25] or even its intensity.[26]

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[22] Where the content of expression is legal, the states' only interest is in regulations designed to protect public safety and welfare. Even then, the regulations must be narrowly drawn to insure no discrimination against speech. *E.g.*, *Grayned* v. *City of Rockford*, 408 U.S. 104, 115 (1972); *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969); and cases cited at note 20 *supra*. The kinds and extent of permissible regulations are dictated by the nature of the public place where the speech occurs and the pattern of its normal activities, 408 U.S. at 116; *see Healy* v. *James*, 408 U.S. 169 (1972); *Adderley* v. *Florida*, 385 U.S. 39 (1967).

[23] *See Adderley* v. *Florida*, *supra*.

[24] *E.g.*, *Mosley*, 408 U.S. at 95.

[25] *See, e.g.*, *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949).

[26] *See, e.g.*, *Saia* v. *New York*, 334 U.S. 558 (1948).

Neither is it meant to suggest that every state facility must be opened for speech. Understandably, the law is that there is no right to a forum unless a forum has been declared to exist. Gorlick, *Right to a Forum*, 71 DICK. L. REV. 273, 274 (1966). *Compare Edwards* v. *South Carolina*, 372 U.S. 229 (1963), *and Brown* v. *Louisiana*, 383 U.S. 131 (1966), *with Adderley* v. *Florida*, 385 U.S. 39 (1967). But, once substantial segments of the public are granted access to an area for purposes of speaking, the public forum doctrine comes into play.

Thus in *Brown* v. *Louisiana*, a silent, orderly protest was allowed within a public library because it did not interfere with the library's function and the protesters' use of the forum was consistent with the purpose for which it had been dedicated. On the other hand, this Court, in *Adderley* v. *Florida*, ruled that the public could be barred from demonstrating on the property of a jail because the activity was interfering with the primary function of the prison.

It is for these reasons that the type of advertising that the Shaker Heights system now allows is of no importance to the controversy over whether or not there is a forum open for speech.[27] The question is not whether the transit system allows First Amendment speech but whether it has determined that transit advertising is inconsistent with its primary role. *E.g.*, *Mosley*, 408 U.S. at 116; *In re Hoffman*,

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[27] Defendants insist that because this Court has previously ruled in *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942), that purely commercial advertising is not protected by the First Amendment, the state could not be considered to have opened a forum for free speech when they have limited their forum to solely non-protected commercial speech. As we have seen, this argument misses the point entirely.

67 Cal.2d 845, 850-51, 434 P.2d 353, 356-57, 64 Cal. Rptr. 97, 100-01 (1967); *Hillside Community Church, Inc.* v. *City of Tacoma*, 76 Wash.2d 63, 68, 455 P.2d 350, 353 (1969); *Wirta* v. *Alameda-Contra Costa Transit District*, 68 Cal. 2d 51, 54 and n. 2, 434 P.2d 982, 985 and n. 2, 64 Cal. Rptr. 430, 433 and n. 2 (1967) (hereinafter cited as *Wirta*);[28] *see* Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, *supra* at 29; Note, 82 HARV. L. REV. 1379, 1382 (1969). Here, by having opened its transit vehicles to commercial speech, the transit authorities have already made that determination: advertising is not incompatible with the primary function of providing transportation. *Wirta*, 68 Cal. 2d at 54, 434 P.2d at 985, 64 Cal. Rptr. at 433.

In addition, the argument that defendants can avoid opening a forum by permitting only unprotected commercial speech[29] disregards a long line of decisions that hold

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[28] *Wirta*, which is directly in point, was twice cited with approval in *Mosley*, 408 U.S. at 97 n. 5, 100, and, therefore, when read in conjunction with *Mosley*, would seem to be dispositive. Of course, defendants have attempted throughout the course of this litigation to distinguish *Wirta* from the present cause on the basis that the Alameda-Contra Costa Transit District accepted advertisements from candidates on the ballot at the time of an election. As discussed in the text, the type of advertising accepted is not critical. A forum is opened when any advertising is accepted. Furthermore, *Wirta* is not so easily distinguished since the *Wirta* court refused to rule on such a narrow ground. The California Supreme Court determined that a forum was created by the district's having "provided facilities for advertisements on its buses." 68 Cal.2d at 54, 434 P.2d at 985, 64 Cal. Rptr. at 433.

[29] The major premise in the defendants' argument, that commercial speech is entirely outside of the protective umbrella of the First Amendment, may be false. The status of commercial speech under the Amendment has not been finally resolved. *Cammarcano* v. *United States*, 358 U.S. 498, 513-14 (1959) (Douglas, J., concurring); *see Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 93 S.Ct. 2553, 2560 (1973), at 2562 (Burger, C.J., dissenting), and at 2566 and n. 6 (Stewart, J., dissenting).

(continued on following page)

that commercial speech can be prohibited even though "free" speech cannot be similarly banned. *Compare Martin* v. *City of Struthers,* 319 U.S. 141 (1943), *and Schneider* v. *State,* 308 U.S. 147 (1939), *with Breard* v. *Alexandria,* 341 U.S. 622 (1951), *and Valentine* v. *Chrestensen,* 316 U.S. 52 (1942). Moreover, the argument is ironical because the scheme reverses traditional First Amendment priorities. Under the differential treatment, free speech is hardly "preferred." *CBS,* 412 U.S. at 201 (Brennan, J., dissenting); *Wirta,* 68 Cal.2d at 57, 434 P.2d at 986, 64 Cal. Rptr. 434; *Hillside Community Church, Inc.* v. *City of Tacoma,* 76 Wash.2d 63, 68, 455 P.2d 350, 353 (1969). No wonder the argument, first made by Justice Burke in his dissent to *Wirta,* has been called "dubious," *Note,* 43 NOTRE DAME L. REV. 781, 785 (1968), and universally rejected. *See Business Executives,* 450 F.2d at 661. If allowed to stand, the holding below would be a "disturbing enlargement of the 'commercial speech' doctrine and a serious encroachment on the freedom of [speech and] press guaranteed by the First Amendment." *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 93 S. Ct. 2553, 2560 (1973) (Burger, C.J., dissenting) (citation omitted).

Furthermore, if the argument is valid, we will have come full circle from *Davis* v. *Massachusetts,* 167 U.S. 43 (1897).[30] The *Davis* Court rejected plaintiff's argument that a forum

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It has been, indeed, suggested that commercial speech is just afforded a lesser First Amendment protection rather than none at all. *Freedom of Expression in a Commercial Context,* 78 HARV. L. REV. 1191, 1202 (1965). *See, e.g., L. G. Balfour Co.* v. *F.T.C.,* 442 F.2d 1, 24 (7th Cir. 1971); *Hiett* v. *United States,* 415 F.2d 664, 672 (5th Cir. 1969); Redish, *The First Amendment in The Marketplace: Commercial Speech and Values of Free Expression,* 39 GEO. WASH. L. REV. 429, 431 (1971).

[30] *Davis* was overruled in *Hague* v. *C.I.O.* *See* note 19 *supra.*

had been opened in a park because, the Court reasoned, the right to absolutely exclude all use of the park necessarily includes the authority to determine under what circumstances such use may be availed of, "as the greater power contains the lesser." 167 U.S. at 48.[31] This is, of course, the same argument attempted by defendants in this case.

Having demonstrated that a public forum was established by the city owned transit system when it provided facilities for advertisements on its cars, we can now focus our attention on the question of whether there is a substantial and compelling reason to bar political advertising.[32]

The respondents have stated that the reasons for its policy of not accepting paid political advertisements are: the chance that some might interpret the advertisements as an endorsement of a particular person; the chance for abuse; the possibility of discrimination or favoritism; and the risk of violating their passengers' rights.

In light of the general principles previously discussed, the city's reasons, even if they were true,[33] cannot be sufficient to justify the selective exclusion from the forum. They clearly do not rise to a showing of a clear and present danger as required by *Brandenburg* v. *Ohio,* 395 U.S. 444

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[31] Of course, this argument has been thoroughly discredited. *See, e.g., Jamison* v. *Texas,* 318 U.S. 413, 415-16 (1943).

[32] In this case, as in *Mosley,* the selective exclusion is based on the content of the advertisements. The central problem with Shaker Heights' policy, to paraphrase the Court, is that it describes permissible advertising in terms of its subject matter. Commercial advertising is permitted, but political advertising is prohibited. 'The operative distinction is the message on a . . . sign." 408 U.S. at 95.

[33] The record is bare of any factual support for the City's contentions. In fact, their claims are entirely *ipse dixit.*

(1969) and *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949). *See Thomas* v. *Collins*, 323 U.S. at 530; *Hillside Community Church, Inc.* v. *City of Tacoma*, 76 Wash.2d at 68-69, 455 P.2d at 354; *Wirta*, 68 Cal.2d at 62, 434 P.2d at 989, 64 Cal. Rptr. at 437; Note, 43 NOTRE DAME L. REV. 781, 785-86 (1968).

The argument that the advertisement might be taken as an endorsement is baseless. This so-called "evil" can be negated by requiring a disclaimer on the face of the advertisement.[34] Even without such a disclaimer few people today are as naive as defendants would have us believe. Indeed, "[t]he endorsement of an opinion expressed in an advertisement on a motor coach is no more attributable to the transit district than the view of a speaker in a public park is to the city administration or the tenets of an organization using school property for meetings is to the local school board." *Wirta*, 68 Cal.2d at 61, 434 P.2d at 989, 64 Cal. Rptr. at 437. Nor is a political advertisement any more attributable to the district than would be a cigarette advertisement.

The justification of the selective policy based on the theory that passengers are a "captive audience" likewise cannot be sustained. It is very doubtful that a political sign could infringe upon a passenger's rights. *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952). A transit rider is not forced or compelled to read any written advertisement. While a person is limited in his ability not to hear a radio message, he is able to look away from a sign

[34] Paragraph (5) of defendant Metromedia's "Metro Transit Advertising Copy Policy" does, in fact, require a disclaimer. Appendix to petition for a writ of certiorari at 13a n. 4. This kind of a disclaimer was upheld in *Bazaar* v. *Fortune*, No. 72-2175 (5th Cir. December 6, 1973) (*en banc*).

if he pleases. *Cohen* v. *California*, 403 U.S. 15, 21 (1971). The present case certainly does not raise the threat to a passenger's privacy that was raised in *Pollak*. If it does, then the answer is to ban all advertising on the transit vehicle. In a democracy can a political advertisement be considered any more obnoxious than, for example, a deodorant commercial?

Moreover, in considering defendants' claim that the political advertisement will interfere with their passenger's rights, we again note that they have never asserted any ways in which political advertisements, in general, or the advertisement here, in particular, could be offensive.

Besides, the allegation is adequately answered in *Cohen*:

> Of course, the mere presumed presence of unwitting listeners does not serve automatically to justify curtailing all speech capable of giving offense. * * * The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.

403 U.S. at 21. This Court also recognized that anyone who wished "could effectively avoid further bombardment of their sensibilities simply by averting their eyes." [25]

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[25] The suggestion that constitutionally protected, political signs "may be banned because some persons may find the ideas expressed offensive is, in itself, offensive to the very meaning of the First Amendment." *CBS*, 412 U.S. at 194-95 n. 35 (Brennan, J., dissenting). *See also* Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481, 1510-15 (1970); Note, *Free Speech and the Hostile Audience*, 22 N.Y.U. L. REV. 489 (1951); Note, *Problem of the Hostile Audience*, 49 COLUM. L. REV. 1118 (1949).

The genius of the First Amendment is that it has always defined what the public ought to hear by permitting speakers to say what they wish in spite of an unreceptive audience. To hold otherwise would be to countenance "authoritative selection," *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603 (1967), based upon an unconfirmed fear of disruption. *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503, 508 (1969).

The contention that possible favoritism or abuse would result from accepting political advertisements is simply a pretense. If the city wishes to avoid favoritism, it need only accept political advertisements from all who are willing to pay the applicable rates. The city cannot bootstrap itself on the fear that it will act arbitrarily.

Nor can the selective exclusion be justified on the claim that allowing political advertisements would create some type of administrative problem. While defendants might think that this problem is somewhat vexatious, it cannot be controlling. *Ross* v. *Goshi,* 351 F. Supp. 949, 953-54 (D. Hawaii 1972). In any event, this contention is merely a straw man since no one would deny that the city has the right to enforce reasonable time, place and manner regulations. *Wirta,* 68 Cal.2d at 434 P.2d at 990; 64 Cal. Rptr. at 438. The fact that a public forum exists within the transit vehicles does not preclude regulations aimed at easing the administrative burdens, if any, or at safeguarding the primary purpose of the cars. Gorlick, *Right to a Forum, supra* at 274 n. 7 (1966). Of course, the regulations must be reasonable and applied to *all* advertising copy equally.

Despite the wealth of cases,[36] some directly in point, which have recognized and applied the doctrine that prevents the state from granting the use of a forum to some while denying it to others based solely by reference to content, the Supreme Court of Ohio refused to grant plaintiff any relief. In short, the decision below can only be characterized as a flagrant rejection of constitutional principles developed by this Court over the past thirty-five years and should be reversed.

[36] *E.g., Mosley, supra; Grayned* v. *City of Rockford*, 408 U.S. 104 (1972); *Wirta, supra; In re Hoffman, supra; Hillside Community Church, Inc.* v. *City of Tacoma, supra; Lee* v. *Board of Regents of State Colleges*, 306 F. Supp. 1097 (W.D. Wisc. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971); and cases cited at note 21 *supra*.

CONCLUSION

For the foregoing reasons, the decision below should be reversed and the case remanded to the Court of Common Pleas for the entering of appropriate relief.

Respectfully submitted,

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FEB 1 1
MICHAEL RODAK, J

Supreme Court of the United States

October Term, 1973

No. 73-328

HARRY J. LEHMAN,
Petitioner,

vs.

CITY OF SHAKER HEIGHTS AND
METROMEDIA, INC.
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT

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Supreme Court of the United States

October Term, 1973

No. 73-328

HARRY J. LEHMAN,
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vs.

CITY OF SHAKER HEIGHTS AND METROMEDIA, INC.
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT

QUESTION PRESENTED

The Question Presented in this proceeding is misleading, in that it presumes the Municipality "opened a forum" when that is one of the issues presented. A more accurate statement of the Question Presented is contained in Paragraph 1 of the Questions Presented in Petitioner's Petition for Writ of Certiorari filed in this Court to the Supreme Court of Ohio, as follows:

> 1. Whether the First Amendment precludes a municipality from refusing to sell political advertising when it sells all other forms of paid commercial and non-commercial advertising for display upon a transit system it owns and operates.

ARGUMENT

I. The Respondent, City of Shaker Heights, Did Not Open a Forum for Political Expression By Accepting Paid Commercial and Non-commercial Advertising on Its Transit System Vehicles.

Initially, it should be noted that the burden is upon the Petitioner to demonstrate the alleged unconstitutionality of the policy of the City of Shaker Heights in refusing *all* political advertising in its rapid transit cars. *Avins v. Rutgers*, 385 F.2d 151 (3d Cir. 1967). It is respectfully submitted that, not only has the Petitioner failed to meet this burden, but the City's policy is indeed reasonable in its application and constitutional.

In his Brief, Petitioner argues, in essence, that by accepting commercial advertising the City of Shaker Heights has opened a "forum" for constitutionally protected political expression.

Petitioner's argument has been presented previously to this Court and has been rejected. *Breard v. City of Alexandria*, 341 U.S. 622 (1951); *Valentine v. Chrestensen*, 316 U.S. 52 (1942); cited also at *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, 41 U.S.L.W. 5055 (U.S. Sup. Ct. 1973). Simply stated, commercial advertising for the retail sale of goods and services is not within the ambit of the First Amendment. See *Wirta v. Alameda-Contra Costa Transit District*, 68 Cal. 2d 51, 54, 434 P.2d 982, 986, 64 Cal. Rptr. 430, 434 (1967); Note, *Freedom of Expression In a Commercial Context*, 78 HARV. L. REV. 1191 (1965). Consequently, the acceptance of commercial advertising by the City of Shaker Heights did not and could not open a forum for the expression of constitutionally protected political advertisement.

Moreover, in each of the cases relied upon by the Petitioner to demonstrate that a forum had been opened, the municipality had permitted the expression of *some* political speech. For example, in *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972) a Chicago ordinance which "exempted peaceful labor picketing from its general prohibition on picketing next to a school" (*Id.* at 94) (emphasis added), was held to be unconstitutional. The Court ruled that once the City of Chicago had opened a forum to protected speech (i.e., peaceful picketing), it was a depravation of the equal protection of the laws to forbid other peaceful picketing.

The instant case is entirely different. Here the City of Shaker Heights has not opened a forum for protected speech by accepting commercial advertising. Indeed, the City has rejected all forms of political advertisement, even school levies.

Likewise, in *Wirta v. Alameda-Contra Costa Transit District, supra*, the Respondent's transit district permitted "political advertising . . . in connection with and at the time of a duly called election . . . ." 68 Cal. 2d at 53, 434 P.2d at 984, 64 Cal. Rptr. at 432. Consequently, the California Supreme Court held that a forum for political expression had been opened and could not be closed constitutionally because the proposed notice was "offensive" or because of "administrative convenience."

The instant case is readily distinguishable. Here the City and Metromedia consistently have refused *all* political advertising. Secondly, in *Wirta*, it was also arguable that the plaintiff's advertisement was refused because the defendant, for matters of "administrative convenience," disagreed with the plaintiff's views. Finally, in rejecting the advertising solely because of its controversial content, the defendants in *Wirta* were exercising

wide discretion. No such discretion or possibility of discrimination exists in the instant case. We must separate those cities which reject all political advertisements from those which permit but regulate. It is the regulation which runs afoul of the constitution, not the prohibition in the context of this case.

Similar distinguishing factors were present in the finding of a "forum" in *Kissinger v. New York Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967); *Radical Lawyers Caucus v. Pool*, 324 F. Supp. 268 (W.D. Tex. 1970); and *Hillside Community Church v. City of Tacoma*, 455 P.2d 350 (Sup. Ct. Wash. 1969). As with the *Wirta* case, these are distinguishable from the instant case on both the explicit and implicit facts relied on by the court in each case. In *Kissinger*, a student organization sued for a declaratory judgment requiring the New York Transit Authority and an advertising company to accept posters opposing participation by the United States in the Vietnam war for display on walls in a City subway station. The evidence was that other political advertisements had been accepted but that the plaintiff's was rejected as being "objectionable to large segments of our population" (274 F. Supp. at 441). In *Radical Lawyers Caucus*, a group of radical lawyers brought a civil rights action against the state bar association and the editor in chief of the bar journal for refusing to publish an advertisement publicizing a caucus which the group was planning to hold during the state bar's annual convention. While the refusal was obstensibly based on a policy prohibiting political or editorial speech in advertisements published in the journal, the facts, however, showed and the court found that editorials and resolutions touching on political matters had, in fact, been printed (269 F. Supp. at 269-270). In *Hillside*, a transit authority had similarly rejected posters re-

lating to ending the war in Vietnam. The transit authority's contract with the advertising company gave the City the right to demand removal of any "advertisements objectionable to the City." The defendants claimed "the sole and absolute discretion to publish or refuse to publish particular advertisements" (455 P.2d at 352).

Thus, the present case is distinguishable from *Wirta*, *Kissinger*, *Radical Lawyers Caucus* and *Hillside* because the rejection of advertising here was not based on vague, standardless policies. Clearly no forum for First Amendment activities has been created on the Shaker Heights Rapid Transit cars, and Petitioner has no constitutional right to require the City and Metromedia to create such a forum.

Petitioner also asserts that his position is supported by the decisions in *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969); *Lee v. Board of Regents*, 306 F. Supp. 1097 (W.D.Wis. 1969); and *Business Executives' Move for Vietnam Peace v. F.C.C.*, 450 F.2d 642 (D.C. Cir. 1971). These cases are readily distinguishable because of the medium with which they dealt. The *Zucker* case dealt with a high school newspaper; the *Lee* case dealt with a college newspaper, and the *Business Executives'* case, with a television station. The crucial issue in these cases, the existence of a "forum," was answered affirmatively because of the nature of the medium. For example, the court in the *Lee* case, at 306 F. Supp. 1100-1101, pointed out the importance of the medium thusly:

> "As a campus newspaper, the Royal Purple [the school's newspaper] constitutes an important forum for the dissemination of news and expression of opinion. As such a forum it should be open to anyone who is willing to pay to have his views published therein—not just to commercial advertisers."

Likewise, the court in *Business Executives'* emphasized that the principle involved in that case was of fundamental importance, and concerned the people's right to engage in, and to hear, vigorous public debate on the broadcast media. The court went on to say:

> "It has always been clear that the broadcast media—so vital to communication in our society—are affected by strong First Amendment interests." 450 F.2d at 649.

Both the *Lee* and *Zucker* courts found a "forum" because of the inherent nature of a newspaper, and the *Business Executives'* court made a similar finding because of the nature of television. These cases are inapplicable to a determination of whether commercial advertising on Rapid Transit cars constitutes "an important forum for the dissemination of news and expression of opinion." See Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L. J. 931; Kalvin, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

Furthermore, a reversal of the Ohio Supreme Court will present a serious problem to a captive audience. While this issue was raised in the *Wirta*, *Kissinger*, and *Hillside* cases, it was there rejected because the defendant transit systems accepted political advertising during election campaigns, showing by their own conduct that they were not concerned for the "captive audience." In marked contrast, the City of Shaker Heights has consistently refused all political advertising, finding that political advertising would interfere with the primary function of the Transit System and demonstrating that it is concerned with the rights of its Transit System passengers. Despite the City's consistent policy, Petitioner *would require* that his political advertising be forced on the captive, perhaps unwilling, passengers in spite of the fact that a wide range of tradi-

tional advertising media are available for his use. Such a result is required neither by law nor logic.

In fact, Petitioner readily concedes that "there is no right to a forum unless a forum has been declared to exist" (Brief of Petitioner at 18). In the instant case, the City did not open a forum to the Petitioner by displaying constitutionally unprotected commercial advertising. Since there was no forum open for the expression of political ideas, it was not a violation of Petitioner's constitutional rights to refuse to publish his political advertisement.

II. The Policy of the City of Shaker Heights in Refusing to Accept All Paid Political Advertising Is Not Arbitrary or Capricious, But Is Reasonable and Constitutional.

The City's complete prohibition on all political advertising in its rapid transit cars is particularly reasonable and appropriate because of the unique problems with captive audiences which this method of advertising presents. See *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 93, 200 (1973) (Brennan, J., dissenting); *Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939). The Courts have recognized that there is a clear distinction between advertising in rapid transit cars and the like with their attended captive audience problems in advertising and other media. For example, in *Packer Corp. v. Utah*, 285 U.S. 105 (1932), the Court pointed out that street car advertising was a special class of advertising in that other forms of advertising were ordinarily seen as a matter of choice. Thus, newspapers and magazines involve some seeking by one seeing the advertisement, and a radio or television can be turned off. But neither is the case with the hapless rider of a street car

(or a rapid transit) who is forced to endure the advertising thrust upon him.

While a passenger on a public vehicle is not entitled to a right of privacy equal to the privacy enjoyed in his own home, *Public Utilities Commission v. Pollack*, 343 U.S. 451 (1952), there are, nevertheless, some constraints on what such a captive rider must endure. Mr. Justice Black, in his concurring opinion in the *Pollack* case, defined these constraints as follows:

> "Capital Transit's musical programs (which also include commercial messages) have not violated the First Amendment. I am of the opinion, however, that *subjecting Capital Transit's passengers to the broadcasting of news, public speeches, views, or propaganda of any kind and by any means would violate the First Amendment.*" *Id.* at 366 (emphasis added).

Thus, Jusitce Black recognized that there is a definite distinction between subjecting a captive audience to commercial messages, on the one hand, and political messages, on the other.

In the instant case, the City has continuously been solicitous of the rights of its rapid transit passengers and made the reasonable decision to prohibit all political advertising, which still permits the Petitioner and those similarly situated to use all other advertising media. Now, however, Petitioner would erase this line, forcing the City into the untenable position of having to accept his political advertising and thereby risk violating the constitutional rights of its rapid transit passengers.

In addition, political advertisements in the cars of the Shaker Heights rapid transit, would suggest, on the one hand, some political favoritism is being granted to candidates who advertise, or, on the other hand, that the candidate so advertised is being supported or promoted by the government of the City. The City itself should not

and does not use public funds or public property for the advancement or promotion of any public candidate or political issue. It follows, therefore, that the City should not lend public facilities to the same end.

Moreover, should the City open the political forum by accepting some political advertisements, or should the City be so ordered by this Court, the linear feet of advertisement space might well be consumed by the many candidates and issues which proliferate 60 days prior each election. Upon demand, the City would then sell out its space to political advertisers and lose valuable pre-Christmas customers who would seek other media and might not return. A regulation by the City dividing the space available into a percentage for political and a percentage for commercial advertising would surely come under attack. Therefore, a total denial to political advertisement is a reasonable solution to this segment of the problem.

In summary, there exists reasonable and constitutionally valid reasons for the policy of the City of Shaker Heights in refusing to accept any and all political advertising for its rapid transit cars. Therefore, the judgment below should be affirmed.

CONCLUSION

The courts below correctly found that plaintiff-petitioner's constitutional rights were not violated by the long-standing policy of the City of Shaker Heights.

The evidence in the case and plaintiff-petitioner's legal argument do not disclose any wrongful discrimination on the part of the City. No deprivation of rights protected by the First and Fourteenth Amendments to the United States Constitution (or Article I, Section 11, of the Constitution of the State of Ohio) has occurred, because no forum for the unrestricted expression of all

forms of ideas has been created or established. The City has not opened up its transit cars to any exchange or presentation of ideas, political or otherwise. The sale of space for commercial advertising does not create such a forum or confer First Amendment rights. No court has so held.

The judgment below should be affirmed.

Respectfully submitted,

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LEHMAN *v.* CITY OF SHAKER HEIGHTS ET AL.

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 73-328. Argued February 26-27, 1974—Decided June 25, 1974

Petitioner, a candidate for state office, who was refused available advertising space on vehicles of a city transit system, brought this suit challenging the constitutionality of the municipal policy on which the refusal was based of not permitting political advertising but allowing other types of public transit advertising. The state courts declined to give petitioner relief, the Ohio Supreme Court holding that the city's refusal did not violate a candidate's free speech or equal protection rights. *Held:* The judgment is affirmed. Pp. 4–

34 Ohio St. 2d 143, 296 N. E. 2d 683, affirmed.

MR. JUSTICE BLACKMUN, joined by THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST, concluded that car card space on a city transit system is not a First Amendment forum and that here the decision to limit transit advertisements to innocuous and less controversial commercial and service-oriented advertising—thus minimizing chances of abuse, appearances of political favoritism, and the risk of imposing upon a captive audience—is within the city's discretion and involves no First or Fourteenth Amendment violation. Pp. 4–6.

MR. JUSTICE DOUGLAS concluded that petitioner, though free to express his views to a willing audience, has no constitutional right to force his message upon a captive audience, which uses public transit vehicles, not as a place for discussion, but only as a means of transport. Pp. 2–4.

BLACKMUN, J., announced the Court's judgment and delivered an opinion, in which BURGER, C. J., and WHITE and REHNQUIST, JJ., joined. DOUGLAS, J., filed an opinion concurring in the judgment. BRENNAN, J., filed a dissenting opinion, in which STEWART, MARSHALL, and POWELL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73-328

Harry J. Lehman, Petitioner, *v.* City of Shaker Heights et al.

On Writ of Certiorari to the Supreme Court of Ohio.

[June 25, 1974]

MR. JUSTICE BLACKMUN announced the judgment of the Court and an opinion, in which THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST join.

This case presents the question whether a city which operates a public rapid transit system and sells advertising space for car cards on its vehicles is required by the First and Fourteenth Amendments to accept paid political advertising on behalf of a candidate for public office.

In 1970, petitioner Harry J. Lehman was a candidate for the office of State Representative to the Ohio General Assembly for District 56. The district includes the city of Shaker Heights. On July 3, 1970, petitioner sought to promote his candidacy by purchasing car card space on the Shaker Heights rapid transit system for the months of August, September, and October. The general election was scheduled for November 3. Petitioner's proposed copy contained his picture and read:

"HARRY J. LEHMAN IS OLD-FASHIONED! ABOUT HONESTY, INTEGRITY AND GOOD GOVERNMENT

State Representative—District 56 [X] Harry J. Lehman." App. 39A.

Advertising space on the city's transit system is managed by respondent Metromedia, Inc., as exclusive agent under contract with the city. The agreement between the city and Metromedia provides:

> "15. . . . The CONTRACTOR shall not place political advertising in or upon any of the said CARS or in, upon or about any other additional and further space granted hereunder." [1]

When petitioner applied for space,[2] he was informed by Metromedia that, although space was then available, the management agreement with the city did not permit political advertising.[3] The system, however, accepted ads from cigarette companies, banks, savings and loan associations, liquor companies, retail and service establishments, churches, and civic and public service ori-

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[1] Metromedia has a written Metro Transit Advertising Copy Policy setting forth the following criteria:

"(1) Metro Transit Advertising will not display advertising copy that is false, misleading, deceptive and/or offensive to the moral standardas of the community, or contrary to good tasts. Copy which might be contrary to the best interests of the transit systems, or which might result in public criticism of the advertising industry and/or transit advertising will not be acceptable.

"(2) Metro Transit Advertising will not accept any political copy that pictorially, graphically or otherwise states or suggests that proponents or opponents of the persons or measures advertised are vulgar, greedy, immoral, monopolistic, illegal or unfair.

. . . . .

"(10) Political advertising will not be accepted on following systems: Shaker Rapid—Maple Heights—North Olmsted—Euclid, Ohio." Shaker Heights' Exhibit A.

[2] Mr. Lehman testified, "We are using various methods [of propromoting my candidacy], including newspaper advertising . . . . We plan to use direct mail advertising, postcards, and circulars of various types." App. 14A.

[3] The system operated only 55 cars, App. 15A, each with 20 advertising spaces. Tr. of Oral Arg. 23–24.

ented groups.[4] There was uncontradicted testimony at the trial that during the 26 years of public operation, the Shaker Heights system, pursuant to city Council action, had not accepted or permitted *any* political or public issue advertising on its vehicles. App. 30A–32A.

When petitioner did not succeed in his effort to have his copy accepted, he sought declaratory and injunctive relief in the state courts of Ohio without success. The Supreme Court of Ohio concluded that "the constitutionally protected right of free speech with respect to forums for oral speech, or the dissemination of literature on a city's streets, does not extend to commercial or political advertising on rapid transit vehicles." 34 Ohio St. 2d 143, 145–146, 296 N. E. 2d 683, 685 (1973). There was no equal protection violation, the court said, because, "[a]s a class, all candidates for political office are treated alike under the Shaker Heights Rapid Transit System's commercial advertising policy." 34 Ohio St. 2d, at 148, 296 N. E. 2d, at 686. The three dissenting justices viewed the transit system's advertising space as a free speech forum and would have held that no valid governmental interest was furthered by the differential treatment between political and other advertising. A policy excluding political advertisements, in their view, would therefore deny political advertisers the equal protection of the law. We granted certiorari in order to consider the important First and Fourteenth Amendment question the case presented.[5] 414 U. S. 1021 (1973).

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[4] Receipts from the sale of advertising amounted to $12,000 annually. Tr. of Oral Arg. 27. These receipts supplemented operating revenues generated from the fares paid by the passengers who used the system daily.

[5] Cf. *Wirta* v. *Alameda-Contra Costa Transit District*, 68 Cal. 2d 51, 434 P. 2d 982 (1967); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (SDNY 1967); *Hillside Community Church* v. *City of Tacoma*, 76 Wash. 2d 63, 455 P. 2d 350 (1969).

It is urged that the car cards here constitute a public forum protected by the First Amendment, and that there is a guarantee of nondiscriminatory access to such publicly owned and controlled areas of communication "regardless of the primary purpose for which the area is dedicated." Brief for Petitioner 14.

We disagree. In *Packer Corp.* v. *Utah*, 285 U. S. 105, 110 (1932), Mr. Justice Brandeis, in speaking for a unanimous Court, recognized that "there is a difference which justifies the classification between display advertising and that in periodicals or newspapers." In *Packer* the Court upheld a Utah statute that made it a misdemeanor to advertise cigarettes on "any bill board, street car sign, placard," but exempted dealers' signs on their places of business and cigarette advertising "in any newspaper, magazine, or periodical." *Id.*, at 107. The Court found no equal protection violation. It reasoned that viewers of billboards and street car signs had no "choice or volition" to observe such advertising and had the message "thrust upon them by all the arts and devices that skill can produce . . . . The radio can be turned off, but not so the billboard or street car placard." *Ibid.* "The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice." *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 468 (1952) (DOUGLAS, J., dissenting). In such situations, "[t]he legislature may recognize degrees of evil and adapt its legislation accordingly." *Packer Corp.* v. *Utah*, 285 U. S., at 110. Cf. *Breard* v. *Alexandria*, 341 U. S. 622 (1951).

These situations are different from the traditional settings where First Amendment values inalterably prevail. Lord Dunedin, in *M'Ara* v. *Magistrates of Edinburgh*, 1913 S. C. 1059, 1073–1074, said, "[T]he truth is that open spaces and public places differ very much in their character, and before you could say whether a certain

thing could be done in a certain place you would have to know the history of the particular place." Although American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question. See, *e. g.*, *Cox* v. *New Hampshire*, 312 U. S. 569 (1941); *Breard* v. *Alexandria, supra; Poulos* v. *New Hampshire*, 345 U. S. 395 (1953); *Cox* v. *Louisiana*, 379 U. S. 559 (1965); *Adderley* v. *Florida*, 385 U. S. 39 (1966); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969); *Police Department of Chicago* v. *Mosley*, 408 U. S. 92 (1972); *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972); *CBS* v. *Democratic National Committee*, 412 U. S. 94 (1973); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376 (1973).

Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles. In making these choices, this Court has held that a public utility "will be sustained in its protection of activities in public places when those activities do not interfere with the general public convenience, comfort and safety." *Public Utilities Comm'n* v. *Pollak*, 343 U. S., at 464–465.

Because state action exists, however, the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious, or invidious. Here, the city has decided that "Purveyors of goods and services saleable in commerce may purchase advertising space on an equal basis, whether they be house builders or butchers." 34 Ohio St. 2d, at 146, 296 N. E. 2d, at 685. This decision is little different from deciding to impose a 10-, 25-, or 35-cent fare, or from changing schedules or the location of bus stops, *Public Utilities Comm'n* v. *Pollak*, 343 U. S., at 465. Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parcelling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.

No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation.

The judgment of the Supreme Court of Ohio is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 73-328

Harry J. Lehman, Petitioner, v. City of Shaker Heights et al. | On Writ of Certiorari to the Supreme Court of Ohio.

[June 25, 1974]

MR. JUSTICE DOUGLAS, concurring in the judgment.

Petitioner, a candidate for state office, attempted to purchase space for paid political advertising on vehicles of the Shaker Heights Rapid Transit System, a system owned and operated by the city of Shaker Heights, Ohio. Metromedia, Inc., the exclusive advertising agent for the system, refused petitioner the space on the basis of a contract with the system prohibiting the acceptance of political advertisements. Lehman unsuccessfully sought injunctive relief in the state courts to restrain the city and Metromedia from refusing his advertising.

The petitioner contends that, by selling advertising space, the city has turned its buses into free speech forums and the city is now prohibited by the First Amendment, applicable to the States through the Fourteenth,[1] from refusing space for political advertisements.

My Brother BRENNAN would find that "[a] forum for communication was voluntarily established when the city

[1] The Court has frequently rested state free speech and free press decisions on the Fourteenth Amendment generally rather than on the Due Process Clause alone. See, *e. g.*, *Bridges* v. *California*, 314 U. S. 252, 263 n. 6 (1941); *Saia* v. *New York*, 334 U. S. 558, 560 (1948); *Elfbrandt* v. *Russell*, 384 U. S. 11, 18 (1966); *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966).

installed the physical facilities for the advertisements and, by contract with Metromedia, created the necessary administrative machinery for regulating access to that forum." *Post,* at —. If the streetcar or bus were a forum for communication akin to that of streets or public parks, considerable problems would be presented. "The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all . . . but it must not, in the guise of regulation, be abridged or denied." *Hague* v. *CIO,* 307 U. S. 496, 516. But a streetcar or bus is plainly not a park or sidewalk or other meeting place for discussion, any more than is a highway. It is only a way to get to work or back home. The fact that it is owned and operated by the city does not without more make it a forum.

Bus and streetcar placards are in the category of highway billboards which have long been used to display an array of commercial and political messages. But this particular form of communication has been significantly curtailed by state regulation adopted pursuant to the Highway Beautification Act of 1965, 23 U. S. C. § 131, which conditions certain federal highway funds upon strict regulation of highway advertising. Ohio is among the States which have sought to protect the interests of their motorists[2] by enacting regulation pursuant to the Act. Ohio R. C. § 5516.01 *et seq.* The fact that land on which a billboard rests is municipal land does not curtail or enhance such regulatory schemes.

If a bus is a forum it is more akin to a newspaper than to park. Yet if a bus is treated as a newspaper,

[2] In a survey of motorists in Ohio, 71% expressed the opinion that billboards should be banned from the interstate highway system. Hearings on S. 1467 before the Subcomm. on Roads of the S. Comm. on Public Works, 90th Cong., 1st Sess., at 43–44 (1967).

then, as we have recently held, *Miami Herald Publishing Co.* v. *Tornillo*, — U. S. —, the owner cannot be forced to include in his offerings news or other items which outsiders may desire but which the owner abhors. Newspaper cases are cited to support petitioner's claim. The First Amendment, however, draws no distinction between press privately owned, and press owned otherwise. And if we are to turn a bus or streetcar into either a newspaper or a park, we take great liberties with people who because of necessity become commuters and at the same time a captive viewer or listener.

In asking us to force the system to accept his message as a vindication of his constitutional rights, the petitioner overlooks the constitutional rights of the commuters. While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.

Buses are not recreational vehicles used for Sunday chautauquas as a public park might be used on holidays for such a purpose; they are a practical necessity for millions in our urban centers. I have already stated this view in my dissent in *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 469 (1952), involving the challenge by some passengers to the practice of broadcasting radio programs over loudspeakers in buses and streetcars: "One who tunes in on an offensive program at home can turn it off or tune in another station, as he wishes. One who hears disquieting or unpleasant programs in public places, such as restaurants, can get up and leave. But the man on the streetcar has no choice but to sit and listen, or perhaps

to sit and try *not* to listen." There is no difference when the message is visual, not auricular. In each the viewer or listener is captive.

I agree with Mr. Justice Brandeis who, quoting from a Utah State Court decision,[3] said that the visual message in streetcars is no different for "[a]dvertisements of this sort are constantly before the eyes of observers on the streets and in streetcars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. . . . In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or streetcar placard." *Packard Corp.* v. *Utah*, 285 U. S. 105, 110 (1932).

I do not view the content of the message as relevant either to petitioner's right to express it or to the commuters' right to be free from it. Commercial advertisements may be as offensive and intrusive to captive audiences as any political message. But the validity of the commercial advertising program is not before us since we are not faced with one complaining of an invasion of privacy through forced exposure to commercial ads. Since I do not believe that petitioner has any constitutional right to spread his message before this captive audience, I concur in the Court's judgment.

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[3] 297 P. 1013, 1019.

SUPREME COURT OF THE UNITED STATES

No. 73-328

Harry J. Lehman, Petitioner, *v.* City of Shaker Heights et al. | On Writ of Certiorari to the Supreme Court of Ohio.

[June 25, 1974]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE POWELL join, dissenting.

The city of Shaker Heights owns and operates the Shaker Heights Rapid Transit System, an interurban electric railroad line consisting of approximately 55 transit cars which transport passengers between Shaker Heights and Cleveland. Each of the cars contains 20 interior advertising spaces available for lease through the Metro Transit Division of Metromedia, Inc., the transit system's exclusive advertising agent. By agreement with the city, Metromedia accepts commercial and public service advertising, but will not accept "political advertising."

Prior to Ohio's 1970 general election, Harry J. Lehman, a candidate for the office of State Representative to the Ohio General Assembly for the 56th District, attempted to lease advertising space on the Shaker Heights Rapid Transit System, because, as he later testified, "the vast majority of its six to eight thousand riders each day are residents of the district . . . ." (Appendix, p. 11A). Although advertising space was available and Lehman's proposed advertisement [1] met Metromedia's copy stand-

[1] The text of the proposed advertisement read as follows:

"Harry J. Lehman Is Old Fashioned About Honesty, Integrity, And Good Government State Representative, District 56"

ards,[2] rental space was nevertheless denied Lehman on the sole ground that Metromedia's contract with the city forbids acceptance of "political advertising."

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[2] The Metro Transit Advertising Copy Policy states:

"(1) Metro Advertising will not display advertising copy that is false, misleading, deceptive and/or offensive to the moral standards of the community, or contrary to good taste. Copy which might be contrary to the best interests of the transit systems, or which might result in public criticism of the advertising industry and/or transit advertising will not be acceptable.

"(2) Metro Transit Advertising will not accept any political copy that pictorially, graphically or otherwise states or suggests that proponents or opponents of the persons or measures advertised are vulgar, greedy, immoral, monopolistic, illegal or unfair.

"(3) All copy subject to approval. Rough sketches with proposed copy required on all political advertising.

"(4) Metro Transit Advertising reserves the right at all times to decline both sides of any proposition and/or opposing candidates.

"(5) Political advertising must carry, visible within the advertising area of the poster, the tag-line:

"'Paid Political Advertising Sponsored by . . .' in letters sized as follows:

"Exterior: 30" x 144" King size posters—1"
21" x 44" Traveling displays—½"
21" x 72" Taillight spectacular—1"

"Interior: 11" x 28"—¼" 11" x 56"—¼"

"(6) Contracts for political advertising space must be accompanied by check for entire amount of contract.

"(7) Posters and/or cards must be delivered, prepaid, 10 days prior to posting date.

"(8) Equal opportunity to purchase space will be offered and allotted for each opposing candidate, bond issue or referendum. If necessary, contracts for political advertising will be held until 30 days prior to the contract posting date, at which time Metro Transit Advertising will allocate the advertising space to each candidate, issue or referendum.

"(9) Minimum order acceptable for either cards or posters is at the one-[month rate].

"(10) *Political advertising will not be accepted on following systems: Shaker Rapid—Maple Heights—North Olmsted—Euclid, Ohio.*" (Emphasis added.)

After an unsuccessful attempt to persuade the city to alter its ban against political advertisements, Lehman commenced this action in the Court of Common Pleas for Cuyahoga County, Ohio, seeking declaratory and injunctive relief on the ground that the city's policy of prohibiting political advertisements infringed his freedom of speech and denied him equal protection of the laws. Finding no constitutional infirmities, the trial court denied relief and was affirmed by both the Cuyahoga County Court of Appeals and the Supreme Court of Ohio.

I would reverse. In my view, the city created a forum for the dissimination of information and expression of ideas when it accepted and displayed commercial and public service advertisements on its rapid transit vehicles. Having opened a forum for communication, the city is barred by the First and Fourteenth Amendments from discriminating among forum users solely on the basis of message content.

I

The message Lehman sought to convey concerning his candidacy for public office was unquestionably protected by the First Amendment. That constitutional safeguard was fashioned to encourage and nurture "uninhibited, robust, and wide-open" self-expression, particularly in matters of governing importance. *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964). "For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964). "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our con-

stitutional system." *Stromberg* v. *California*, 283 U. S. 359, 369 (1931). The fact that the message is proposed as a paid advertisement does not diminish the impregnable shelter afforded by the First Amendment. See, *New York Times Co.* v. *Sullivan*, *supra*, 376 U. S., at 271.

Of course, not even the right of political self-expression is completely unfettered. As we stated in *Cox* v. *Louisiana*, 379 U. S. 536, 554 (1965):

> "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy."

Accordingly, we have repeatedly recognized the constitutionality of reasonable "time, place and manner" regulations which are applied in an evenhanded fashion. See *e. g.*, *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 98 (1972); *Grayned* v. *City of Rockford*, 408 U. S. 104, 115 (1972); *Cox* v. *Louisiana*, *supra*, 379 U. S., at 554–555; *Poulos* v. *New Hampshire*, 345 U. S. 395, 398 (1953); *Cox* v. *New Hampshire*, 312 U. S. 569, 575–576 (1941); *Schneider* v. *State*, 308 U. S. 147, 160 (1939).

Focusing upon the propriety of regulating "place," the city of Shaker Heights attempts to justify its ban against political advertising by arguing that the interior advertising space of a transit car is an inappropriate forum for political expression and debate. Respondent's Brief, p. 7. To be sure, there are some public places which are so clearly committed to other purposes that their use as public forums for communication is anomalous. For example, "[t]here may be some instances in which assem-

blies and petitions for redress of grievances are not consistent with other necessary purposes of public property. A noisy meeting may be out of keeping with the serenity of the statehouse or the quiet of the courthouse. No one . . . would suggest that the Senate gallery is the proper place for a vociferous protest rally. And in other cases it may be necessary to adjust the right to petition for redress of grievances to the other interests inhering in the uses to which the public property is normally put." *Adderley* v. *Florida*, 385 U. S. 39, 54 (1966) (DOUGLAS, J., dissenting). The determination of whether a particular type of public property or facility constitutes a "public forum" requires the Court to strike a balance between the competing interests of the government, on the one hand, and the speaker and his audience, on the other.[3] Thus, the Court must assess the importance of the primary use to which the public property or facility is committed and the extent to which that use will be disrupted if access for free expression is permitted.

Applying these principles, the Court has long recognized the public's right of access to public streets and parks for expressive activity. As Mr. Justice Roberts wrote in *Hague* v. *CIO*, 307 U. S. 496, 515–516 (1939):

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privi-

[3] See generally, Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1; Gorlick, Right to a Forum, 71 Dick. L. Rev. 273 (1966); Horning, The First Amendment Right to a Public Forum, 1969 Duke L. J. 931.

leges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

See also *Jamison* v. *Texas*, 318 U. S. 413 (1943); *Cox* v. *Louisiana*, *supra*. More recently, the Court has added state capitol grounds to the list of public forums compatible with free speech, free assembly, and the freedom to petition for redress of grievances, *Edwards* v. *South Carolina*, 372 U. S. 229 (1963), but denied similar status to the curtilage of a jailhouse, on the ground that jails are built for security and thus need not be opened to the general public, *Adderley* v. *Florida*, 385 U. S. 39 (1966).[4]

In the circumstances of this case, however, we need not decide whether public transit cars *must* be made available as forums for the exercise of First Amendment rights. By accepting commercial and public service advertising, the city effectively waived any argument that advertising in its transit cars is incompatible with the rapid transit system's primary function of providing transportation. A forum for communication was voluntarily established when the city installed the physical facilities for the advertisements and, by contract with

[4] Public forum status has also been extended to municipal bus terminals, see *Wolin* v. *Port of New York*, 392 F. 2d 83 (CA2 1968), and railroad stations, see *In re Hoffman*, 434 P. 2d 353, 64 Cal. Reptr. 97 (1967).

Metromedia, created the necessary administrative machinery for regulating access to that forum.[5]

The plurality opinion, however, contends that as long as the city limits its advertising space to "innocuous and less controversial commercial and service oriented advertising," no First Amendment forum is created. *Ante*, p. 6. I find no merit in that position. Certainly, noncommercial public service advertisements convey messages of public concern and are clearly protected by the First Amendment. And while it is possible that commercial advertising may be accorded *less* First Amendment protection than speech concerning political and social issues of public importance, compare *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942), with *Schneider* v. *State*, *supra*, and *Breard* v. *City of Alexandria*, 341 U. S. 622 (1951), with *Martin* v. *City of Struthers*, 319 U. S. 141 (1943), it is "speech" nonetheless, often communicating information and ideas found by many persons to be controversial.[6] There can be no question that commercial advertisements, when skillfully employed, are

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[5] My Brother DOUGLAS' analogy to billboard and newspaper advertising, *ante*, p. —, is not apropos in the circumstances of this case where the advertising display space is *city* owned and operated.

[6] There is some doubt concerning whether the "commercial speech" distinction announced in *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942), retains continuing validity. MR. JUSTICE DOUGLAS has remarked, "The ruling was casual, almost offhand. And it has not survived reflection." *Cammarano* v. *United States*, 358 U. S. 498, 514 (1959) (concurring opinion). See also, *Pittsburgh Press Co.* v. *Human Rel. Comm'n*, 413 U. S. 376, 393 (1973) (BURGER, C. J., dissenting); *id.*, at 398 (DOUGLAS, J., dissenting); *id.*, at 401 (STEWART, J., dissenting). That question, however, need not be decided in this case. It is sufficient for the purpose of public forum analysis merely to recognize that commercial speech enjoys at least *some* degree of protection under the First Amendment, without reaching the more difficult question concerning the *amount* of protection afforded.

powerful vehicles for the exaltation of commercial values. Once such messages have been accepted and displayed, the existence of a forum for communication cannot be gainsaid. To hold otherwise, and thus sanction the city's preference for bland commercialism and noncontroversial public service messages over "uninhibited, robust, and wide-open" debate on public issues, would reverse the traditional priorities of the First Amendment.[7]

II

Once a public forum for communication has been established, both free speech and equal protection principles prohibit discrimination based *solely* upon subject matter or content.[8] See, *e. g.*, *Police Department of Chicago* v. *Mosley*, *supra*, 408 U. S., at 95–96; *Cox* v. *Louisiana*, *supra*, 379 U. S., at 581 (Black, J., concurring); *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953); *Niemotko* v. *Maryland*, 340 U. S. 268, 272–273 (1951).

> "Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself,

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[7] Other courts have reached the same conclusion on nearly identical facts. See *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (SDNY 1967); *Hillside Community Church, Inc.* v. *City of Tacoma*, 76 Wash. 2d 63, 455 P. 2d 350 (1969); *Wirta* v. *Alameda-Contra Costa Transit District*, 68 Cal. 2d 51, 64 Cal. Rptr. 430, 434 P. 2d 982 (1967).

[8] The plurality opinion's reliance upon *Packer Corp.* v. *Utah*, 285 U. S. 105 (1932) is misplaced. As Mr. Justice Douglas noted in *Cammarano* v. *United States*, 358 U. S. 498, 513 (1959):

"In *Packer Corp.* v. *Utah*, 285 U. S. 105, the First Amendment problem was not raised. The extent to which such advertising could be regulated consistently with the First Amendment (cf. *Cantwell* v. *Connecticut*, 310 U. S. 296; *Martin* v. *Struthers*, 319 U. S. 141; *Bread* v. *Alexandria*, 341 U. S. 622; *Roth* v. *United States*, 354 U. S. 476) has therefore never been authoritatively determined."

See also n. 6, *supra*.

> government may not grant the use of a forum to people whose views it finds acceptable, but deny use to these wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all point of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusion from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Police Department of Chicago* v. *Mosley, supra,* 408 U. S., at 96 (footnote omitted).

That the discrimination is among entire classes of ideas, rather than among points of view within a particular class, does not render it any less odious. Subject matter or content censorship in any form is forbidden.[9]

To insure that subject matter or content is not the sole basis for discrimination among forum users, all selective exclusions from a public forum must be closely scrutinized and countenanced only in cases where the Government makes a clear showing that its action was taken pursuant to neutral "time, place and manner" regulations, narrowly tailored to protect the Government's substantial interest in preserving the viability and utility of the forum itself. See, *e. g., Police Department of Chicago* v. *Mosley, supra,* 408 U. S., at 98–

[9] The existence of other public forums for the dissemination of political messages is, of course, irrelevant. As the Court said in *Schneider* v. *State,* 308 U. S. 147, 163 (1939), "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

102; *Grayned* v. *City of Rockford, supra,* 408 U. S., at 115–117; *Shuttlesworth* v. *Birmingham,* 394 U. S. 147, 152–153 (1969); *Tinker* v. *Des Moines School District,* 393 U. S. 503, 508, 514 (1969); *cf. Dunn* v. *Blumstein,* 405 U. S. 330, 336–337 (1972); *Williams* v. *Rhodes,* 393 U. S. 23, 31 (1968). The city has failed to discharge that heavy burden in the present case.

The Court's special vigilance is triggered in this case because of the city's undisputed ban against political advertising in its transit cars. Commercial and public service advertisements are routinely accepted for display, while political messages are absolutely prohibited. Few examples are required to illustrate the scope of the city's policy and practice. For instance, a commercial advertisement peddling snowmobiles would be accepted, while a counter-advertisement calling upon the public to support legislation controlling the environmental destruction and noise pollution caused by snowmobiles would be rejected. Alternatively, a public service ad by the League of Women Voters would be permitted, advertising the existence of an upcoming election and imploring citizens to vote, but a candidate, such as Lehman, would be barred from informing the public about his candidacy, qualifications for office, or position on particular issues. These, and other examples,[10] make perfectly clear that the selec-

[10] In declaring unconstitutional an advertising policy remarkably similar to the city's policy in the present case, the California Supreme Court detailed "the paradoxical scope of the [transit] district's policy [banning political advertising]" in the following manner:

"A cigarette company is permitted to advertise the desirability of smoking its brand, but a cancer society is not entitled to caution by advertisements that cigarette smoking is injurious to health. A theater may advertise a motion picture that portrays sex and violence, but the Legion for Decency has no right to post a message calling for clean films. A lumber company may advertise its wood products, but a conservation group cannot implore citizens to write

tive exclusion of political advertising is not the product of evenhanded application of neutral "time, place, and manner" regulations. Rather, the operative—and constitutionally impermissible—distinction is the message on the sign. That conclusion is not dispelled by any of the city's asserted justifications for selectively excluding political advertising.

The city contends that its ban against political advertising is bottomed upon its solicitous regard for "captive riders" of the rapid transit system, who are "forced to endure the advertising thrust upon [them]." Respondents' Brief, p. 8. Since its rapid transit system is primarily a mode of transportation, the city argues that it may prohibit political advertising in order to shield its transit passengers from sometimes controversial or unsettling speech. Whatever merit the city's argument might have in other contexts, it has a hollow ring in the present case, where the city has voluntarily opened its rapid transit system as a forum for communication. In that circumstance, the occasional appearance of provocative speech should be expected. Indeed, the Court has recognized that "a function of free speech under our system of government is to invite dispute. . . . Speech is often provocative and challenging. It may strike at prejudices and misconceptions and have profound un-

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to the President or Governor about protecting our natural resources. An oil refinery may advertise its products, but a citizens' organization cannot demand enforcement of existing air pollution statutes. An insurance company may announce its available policies, but a senior citizens' club cannot plead for legislation to improve our social security program. The district would accept an advertisement from a television station that is commercially inspired, but would refuse a paid nonsolicitation message from a strictly educational television station. Advertisements for travel, food, clothing, toiletries, automobiles, legal drugs—all these are acceptable, but the American Legion would not have the right to place a paid advertisement reading, 'Support Our Boys in Viet Nam. Send Holiday Packages.'"

settling effects as it presses for acceptance of an idea." *Terminiello* v. *City of Chicago*, 337 U. S. 1, 4 (1949).

The line between ideological and nonideological speech is impossible to draw with accuracy. By accepting commercial and public service advertisements, the city opened the door to "sometimes controversial or unsettling speech" and determined that such speech does not unduly interfere with the rapid transit system's primary purpose of transporting passengers. In the eyes of many passengers, certain commercial or public service messages[11] are as profoundly disturbing as some political advertisements might be to other passengers. There is certainly no evidence in the record of this case indicating that political advertisements, as a class, are so disturbing when displayed that they are more likely than commercial or public service advertisements to impair the rapid transit system's primary function of transportation. In the absence of such evidence, the city's selective exclusion of political advertising constitutes an invidious discrimination on the basis of subject matter, in violation of the First and Fourteenth Amendments.

Moreover, even if it were possible to draw a manageable line between controversial and noncontroversial messages, the city's practice of censorship for the benefit of "captive audiences" still would not be justified.[12] This is not a case

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[11] For example, the record indicates that *church advertising* was accepted for display on the Shaker Heights Rapid Transit System. See App. p. 26A.

[12] My Brother DOUGLAS' contrary view, that the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience," irrespective of whether the speech in question is commercial or noncommercial, *ante*, p. —, does not dispose of the First and Fourteenth Amendment issues in this case. The record reveals that the Shaker Heights Rapid Transit System provides advertising space on the *outside* as well as the inside of its cars. See App. p. 24A. Lehman

where an unwilling or unsuspecting rapid transit rider is powerless to avoid messages he deems unsettling. The advertisements accepted by the city and Metromedia are not broadcast over loudspeakers in the transit cars. The privacy of the passengers is not, therefore, dependent upon their ability "to sit and try *not* to listen." *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 469 (1952) (DOUGLAS, J., dissenting); cf. *Kovacs* v. *Cooper*, 336 U. S. 77 (1949); *Saia* v. *New York*, 334 U. S. 558, 562 (1948). Rather, all advertisements accepted for display are in *written* form. Transit passengers are not forced or compelled to read any of the messages, nor are they "incapable of declining to receive [them]," *ante*, p. — (DOUGLAS, J., concurring). Should passengers chance to glance at advertisements they find offensive, they can "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen* v. *California*, 403 U. S. 15, 21 (1971). Surely that minor inconvenience is a small price to pay for the continued preservation of so precious a liberty as free speech.

The city's remaining justification is equally unpersuasive. The city argues that acceptance of "political advertisements in the cars of the Shaker Heights rapid transit, would suggest, on the one hand, some political favoritism is being granted to candidates who advertise, or, on the other hand, that the candidate so advertised is being supported or promoted by the government of the City." Respondents' Brief, p. 8. Clearly, such ephemeral concerns do not provide the city with *carte blanche* authority to exclude an entire category of speech from a public forum. "These pragmatic hurdles are no more relevant to a public forum when it is a motor coach than

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was denied access to both. Whatever applicability a "captive audience" theory may have to interior advertising, it simply cannot justify the city's refusal to rent Lehman *exterior* advertising space.

they are to a public park or a school auditorium. The endorsement of an opinion expressed in an advertisement on a motor coach is no more attributable to the transit district than the view of a speaker in a public park is to the city administration or the tenents of an organization using school property for meetings is to the local school board." *Wirta* v. *Alameda-Contra Costa Transit District*, 68 Cal. 2d 51, 61, 64 Cal. Rptr. 430, 437, 434 P. 2d 982, 989 (1967). The city has introduced no evidence demonstrating that its rapid transit passengers would naively think otherwise. And though there may be "lurking doubts about favoritism," *ante*, p. 6, the Court has held that "[n]o such remote danger can justify the immediate and crippling impact on the basic constitutional rights involved in this case." *Williams* v. *Rhodes*, *supra*, 393 U. S., at 33.

Moreover, neutral regulations, which do not distinguish among advertisements on the basis of subject matter, can be narrowly tailored to allay the city's fears. The impression of city endorsement can be dispelled by requiring disclaimers to appear prominently on the face of every advertisement.[13] And while problems of accommodating all potential advertisers may be vexing at times, the appearance of favoritism can be avoided by the even-handed regulation of time, place, and manner for all advertising, irrespective of subject matter.

I would, therefore, reverse the judgment of the Supreme Court of Ohio and remand this case for further proceedings not inconsistent with this opinion.

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[13] Metro's current copy policy provides for such disclaimers in those city transit systems that accept political advertisements. See n. 2, *supra*, at ¶ (5).